S. G Rix Hull

A HISTORY OF THE ENGLISH COURTS

First Edition . . . 1899
Second Edition . . . 1902
Third Edition . . . 1906
Fourth Edition . . . 1910
Fifth Edition . . . 1927

A HISTORY OF THE ENGLISH COURTS

BY

A. T. CARTER, C.B.E., K.C.

BEING A

FIFTH EDITION

OF

A HISTORY OF ENGLISH LEGAL INSTITUTIONS

LONDON:
BUTTERWORTH & CO. (PUBLISHERS), LTD.
BELL YARD, TEMPLE BAR.

SYDNEY:
MELBOURNE: BUTTERWORTH & CO. (AUSTRALIA), LTD.
CALCUTTA:
MADRAS: BUTTERWORTH & CO. (INDIA), LTD.
BOMBAY:
TORONTO: BUTTERWORTH & CO. (PUBLISHERS), LTD.
WELLINGTON (N.Z.): BUTTERWORTH & CO. (AUSTRALIA), LTD.

1927

PRINTED IN GREAT BRITAIN

PRINTED IN GREAT BRITAIN BY
WILLIAM CLOWES AND SONS, LIMITED,
LONDON AND BECCLES.

PREFACE

THIS does not pretend to be a book of Research, for it is the purpose of Research, I think, to advance the boundaries of knowledge—*propagare fines*. I have been gleaning in the fields brought into cultivation by other men, like Stubbs, Maitland, Bigelow, Baildon, Baldwin, and Bolland. To them I have made constant reference in the notes, and I acknowledge gladly my general debt to their writings, many of them published by the admirable Selden Society.

As some of my readers have no Latin, the Latin documents have been put into the footnotes : to others English is a foreign language,—I have tried to bear that in mind.

I have printed the order and dates of the English Kings, as experience has shown that these may properly be classed as " things not generally known," and uncertainty as to the relative position in time of Plantagenet, Tudor, and Stuart is sometimes embarrassing.

Those who wish to go further into these matters will naturally seek the sources. I hope that I may help those whose interest is more transitory.

A. T. C.

July, 1927.

CONTENTS

THE KINGS OF ENGLAND AND THE DATES OF THEIR ACCESSION

William the Conqueror	1066	Henry VIII	1509
William Rufus	1087	Edward VI	1547
Henry I	1100	Mary	1553
Stephen	1135	Elizabeth	1558
Henry II	1154	James I	1603
Richard I	1189	Charles I	1625
John	1199	Protectorate	1649
Henry III	1216	Charles II	1660
Edward I	1272	James II	1685
Edward II	1307	William and Mary	1689
Edward III	1327	Anne	1702
Richard II	1377	George I	1714
Henry IV	1399	George II	1727
Henry V	1413	George III	1760
Henry VI	1422	George IV	1820
Edward IV	1461	William IV	1830
Edward V	1483	Victoria	1837
Richard III	1483	Edward VII	1901
Henry VII	1485	George V	1910

HISTORY OF THE ENGLISH COURTS

CHAPTER I

BEFORE THE NORMANS

THE English Judicial System was built on and into Saxon institutions by the Norman and Angevin Kings. The Shire and Hundred Moots have gone, and we now have the King's Courts, but for a thousand years one feature has, in some form or other, persisted. In those Courts justice was "popular" not professional, and the laity were the judges. To-day, the verdict of a Jury may be odd, sometimes perverse, but, even if it were not subject to review, we should be paying a small price for the comfortable confidence which is secured to us by the constant association of ordinary common people, the "country" or "pais," with the public administration of justice.

Communal Courts.—Before the Norman Conquest justice was administered locally in the Shire Moot and the Hundred Moot. The Shire Moot sat twice a year, the Hundred Moot once every four weeks.* For what we may call Local Government purposes, the Kingdom was divided into Townships, or Vills. A cluster of Vills formed a Hundred, and a cluster of Hundreds formed a Shire. The judicial unit was the Hundred Court. Some of the larger Vills, with higher organisation, were called *Burhs;* they had Courts and, with few exceptions, ranked as Hundreds.†

---

* *Sel. Ch.* 70, 105.

† The burh, or borough, was of strategic or commercial importance. It may have been a fort with a garrison, or a centre of trade or manufacture, with a gild and a court, and special customs and privileges. It represented the commercial rather than the agricultural side of the national life. Some of them ranked as shires and had sheriffs of their own. Their vitality is shown by the fact that they returned burgesses to the earliest Parliaments.

Franchise Courts.—There were also some Courts of private jurisdiction, held in virtue of right, of "Sac" and "Soc," *i.e.* the right to hold a Court and the right to the profits therefrom.

These at the time of the Norman Conquest were in the hands of Lords of Manors or of Ecclesiastical foundations. Many originated in Royal Grant—Edward the Confessor was lavish in his grants to the Church—some in prescription. This is attributed partly to the practice of Commendation, partly to the association of landholding with jurisdiction, partly to the consent of the parties. These Courts were so numerous and various that, as Mr. Adams puts it, "the entire judicial system of England was torn in pieces," justice was no longer a public trust, but a private property.* These Franchise Courts were regarded as proprietary Hundred Courts. They administered the same law, observed the same procedure, and were subordinate to the Shire Court.

Communal Courts.—To the Hundred Moot came from every town the Town Reeve and four men and the Parish Priest. The President was the Hundred man who was helped by the twelve Senior Thegns who made the presentments of the Hundred, and accused guilty persons.†

To the Shire Moot came the free men, the lords or their Stewards, the Town Reeves with their four men, and the Parish Priest. It was presided over by the Bishop, the Ealdorman, and the Sheriff, the presentments were made by the twelve Senior Thegns. In both Courts the Judges were the assembled free men, or their representatives, not the presiding officer.

Far away is the King and his Witan, not to be approached unless the suppliant cannot get his cause heard in the local Courts.

It will be noticed that at present there is only one Court for secular and ecclesiastical cases.‡

These local Courts had no professional assistance, they were assemblies of the neighbours in which every man was his own lawyer. They had no policemen, and no process by which they could compel attendance. If a man declined to appear, the only thing to do was to declare him an Outlaw. This put him outside the Law, and then any one could kill him without blame or payment. The business was mainly the trial of offences of violence,

---

* *Essays in A.-S. Law*, pp. 51, 59.

† Cf. Ord. of Ethelred. Stubbs, *Sel. Ch.* 71–3.

‡ "let there be present the bishop of the shire and the ealdorman and there both expound as well the law of God as the secular law." Ord. of Edgar. Stubbs, *Sel. Ch.* 71.

and theft, usually of cattle. Civil business was scanty, and credit almost unknown. The Court declared the local customs, awarded compensation, and acted generally as a Board of mutual arbitration in neighbours' disputes.

Procedure.—At the present day a party to an action is required to satisfy the Court and Jury. He was under no such necessity then. It was no business of the Moot to try to discover the truth, to weigh the evidence, or even to form an opinion. The duty of the Moot, as represented by its "judicial committee"—the president and the twelve senior thegns—was to hear the complaint and decide how and by whom the proof should be given, and the consequences of failure or success. Having delivered this decision in an interlocutory or "Medial" Judgment the members of the Court were, save as spectators, *functi officio*. The rest was left to God. An appeal was made in some form or other to the Supernatural.

In Civil cases an oath was taken, either by the party alone, or together with Oath helpers (compurgators), and if the oath was formally and neatly taken—for "fail in a syllable fail in your case," "qui cadit a syllaba cadit a tota causa"—here was not evidence merely but actual incontestable proof. Proof was one-sided, and the only course open to the defeated party was to bring a criminal charge of perjury against those who, he said, had sworn falsely.

In Criminal cases also the Oath was used, but in the background was the Ordeal * if the accused was of bad character and not oath worthy, or if the circumstances were too strong and he was unable to get helpers to swear that they believed his oath. One kind of criminal did not get even this chance. A man taken red-handed was sentenced without any of the law's delay. "That which is quite plain needs no proof" "ea quæ manifesta sunt non indigent probatione". The punishments were, in serious cases, death and mutilation, in others pecuniary penalties.

---

* The Ordeal, an Indo-European institution, was of three principal sorts, all found in the East: Fire, Water, and Dry Bread. In that of Fire, the suspected person either plunged his hand or arm into boiling water, or carried a red-hot bar of iron, or walked on red-hot ploughshares. If he suffered no harm, his innocence had been wonderfully and miraculously shown. In that of Water, he was tied and thrown into water; if he floated, the water rejected him and he was guilty. If he sank to the bottom, and stayed there he was innocent. In that of the Dry Bread or Corsnaed, the prisoner, after calling on God, put the piece of dry bread in his mouth. If he choked on it, he was guilty. In India a little dry rice takes the place of the bread. In this last there is a physiological basis. Nervousness inhibits salivation. The Church presided over the other two.

A good character, on the other hand, was an available asset, and its owner when accused of some offence might, if the case was not too black, be permitted to clear himself with an adequate number of Oath helpers. He himself swore, and if he could so manage that neither he nor any of his friends swallowed some word in the formula, nor dropped the book on the floor, his innocence was established, for he had successfully "waged his law." Oaths were not weighed but counted.

The origin of the system of compurgation seems to lie either in kinship or in some form of artificial association, or in both. Whether or no the compurgators were originally kinsmen, kinsmen could always be compurgators. Mr. Pike* prefers to connect the institution with the Gild, which in various forms involved the principle of association either voluntary or compulsory. If a man had no kin he must, says Mr. Pike, be given an association. This became general and compulsory. Every free man below a certain rank must be in a tithing of ten persons who mutually insured each other's conduct and who had thus a distinct pecuniary interest in each other's acquittal. The tithing was bound to produce the accused member, and if they failed they paid; they could make oath for him on his trial, and if they failed herein they paid. The voluntary gilds in the same way helped the unhappy brother. Such assistance was not only socially meritorious but economically correct.

The Blood Feud.—One cannot doubt that this system links up with another institution, old, deep-rooted, and ubiquitous, the Blood feud or Vendetta, and the payment which in time bought it off.

Primitive man, if wronged, took his vengeance as well as he could; if he was slain, it was the duty of his relatives to take vengeance on all connected with the slayer or with the slaying.†

---

* *Hist. of Crime in England*, 55 *sq.*

† I was once told by a friend who knew him personally, that Sir Salter Pyne, who for some time enjoyed a large measure of the confidence of his late lamented Highness the Amir Abdurrahman at Cabul and was in consequence the object of jealousy, was fired at one day in the Bazaar. He complained to the Amir, who treated the complaint, as Sir Salter thought, with too little concern. "A fortnight afterwards," he said, "the Amir asked me, as was sometimes his way, to ride with him into the country. We rode out along a road lined on both sides with gibbets, each bearing its fruit. I think there must have been nearly a hundred. 'Your Highness has been busy,' I said. 'Oh!' said the Amir indifferently, 'this is your small affair.' 'But,' I protested, 'only one man fired at me.' 'Doubtless,' said the Amir, 'he is there; the rest are his relations.'"

The Berbers are stated by Mr. Walter B. Harris probably to be of

Even to-day the habit survives in simple and otherwise attractive communities.

A distinct advance is made when it is recognised that the right of vengeance belongs properly only to a limited circle of the relatives of the dead man, and that retribution can only properly be exacted from a limited circle of the relatives of the offender.

The next stage is reached when it is perceived that this perpetuation of slaughter, even though confined within limits, hurts the society which allows it.

So when it was seen that the community could ill-spare its warrior, its man who could fight, there grew up the view that a compensation was permissible, *i.e.* a payment to buy off the feud. It was apparently at first optional with the injured party or his relatives to take or reject the payment. But the amount of the payment seems at a very early period to have been settled by the common judgment of the community.*

Then there grew up what may be called an *opinio necessitatis*, *i.e.* the public feeling that compensation *ought* not to be denied when asked, or refused when offered. There were, however, some offences which were so grave as to be irredeemable or as they were called *bôtless*, for them no payment was permitted. If a man caught his enemy asleep or in Church and killed him, he was expelled by his community and driven out.

One of the first problems that meet a political society in its early days is how to persuade the plaintiff—for it cannot compel him—to come into Court and deny himself the pleasure of private revenge. The next task is to put pressure on the defendant to come in.† The plaintiff was bribed in various ways. In the

---

European kindred, and to combine a European sense of humour with intense pugnacity. This, together with their inability till now to obtain justice, has accustomed them to blood feuds which are hereditarily carried on with such whole-hearted ferocity that it is rare for a male Berber to survive to old age (*France, Spain, and the Riff* (1927)). Mr. Edmonds, in his book on Albania (*In the Land of the Eagle* (1927)), tells how a priest inherited the headship of the family and a feud. He killed the man duly, and then—in the absence of any other priest—took the funeral service.

* We have the list, or rather the lists, of the Anglo-Saxon compositions (wergild). They varied in various places, but in Anglia the King's life was valued at 30,000 thrimsas (about £1,300), the Prince's at 15,000, the Bishop's and Alderman's at 8,000, the Sheriff's at 4,000, a thegn's or cleric's at 2,000, a churl's at 266. *Sel. Ch.* 65.

† Jurisdiction is founded on consent. There was a strange and deep-seated objection to trying a man without his consent. How the consent was obtained was immaterial. For centuries the prisoner was asked, How will

Roman Law we know that the *furtum manifestum* was punished with twice as much severity as the *furtum nec manifestum*, and the explanation offered is that the injured man would be more likely to stay his hand, when he caught the thief in fresh pursuit, if he knew that the law in punishing the culprit would consider not only the nature of the offence, which was indeed the same in both cases, but also the legitimate indignation of the law-abiding citizen. Our own Henry I decreed that all thieves taken in the act should be hanged.* It may, however, be that the skilful thief was considered, in a manner, admirable, and that the bungler got no sympathy. *Spondes peritiam artis.* It is possible that the offer of trial by battle was another way of inducing the plaintiff to come in. The defendant was forced in by distraint on his property and outlawry. The second stage is that the plaintiff must come and get the judgment of the Court; he is then allowed to go and execute the judgment with his own hands. The central government is not yet sufficiently organised to execute its judgment itself.† The third and last stage is when the State is strong enough not only to hear the complaint, and give judgment, but to insist on executing its judgment. When this happens, then over a considerable field, the conception of Crime and Punishment supersedes that of Tort and Compensation.

There is another feature of archaic justice to be noticed. The conviction that it was humanly impossible to prove "intent," a state of mind which the commonest of common juries of the present day is invited to infer from surrounding circumstances, produced minute rule as to external conduct. Even as late as the seventh year of Edward IV the Chief Justice Brian said, "the thought of man is not triable for the devil himself knoweth not the thought of man." So if a man killed another and the question

---

you be tried? To this the proper answer was "By God and my Country." If he could answer, but would not, an effort was made to persuade him by gradually piling weights on his body, till he either agreed or died. If he died, he died unconvicted and saved the forfeitures. This was the *peine forte et dure*. The practice was not formally abolished till 1772.

* *Sel. Ch.* 97.

† Cf. a north-country custom mentioned in P. & M. ii. 495 n., *Northumberland Assize Rolls*, p. 70. "The custom of the county is that when any thief is taken with the goods, he shall instantly be beheaded, and the aggrieved owner shall have his chattels back for beheading him." I translate the Latin.

The prohibition in the Dooms of Ire of Wessex, A.D. 680, against taking the law into one's own hands without going first to the proper Court to seek justice shows that the "reign of law" is beginning.

arose whether it was by accident, the Anglo-Saxon Court asked how was he carrying his spear? was he carrying it horizontally on his shoulder, or with the point back or in front? The intent is not considered, the rule being that a man shall carry his spear in a certain way, and if he abandons the rule he abandons it at his peril. Again, the difficulty in getting direct evidence of guilt coupled with the distrust apparently felt for inferential processes explains the severity of the Anglo-Saxon law against those who have been often accused and are of no credit. Such a man, if accused of any crime is already half-condemned, there is no rule that he must be presumed innocent till he is found guilty.

Custom.—Life was ruled by Custom, of which the depositories were the Ancients, the γέροντες, the senior thegns. Archaic peoples fear change, for to do something that no one has done before may be to do something which is wicked, or, what is as bad, unlucky. And not unlucky to the sinner only, for his impiety may involve his tribe in ruin. Liability is not limited. Departure from the normal is therefore regarded not as a mark of genius, but as a public danger. The number of early declaratory statutes testify that archaic society regarded change with apprehension and dislike.

Customs varied in various places, but there were three great systems in England, the Dane Law, the Mercian Law, and the Wessex Law, the alluvial deposits of foreign invasion and settlement.

But after the Conquest these Customs "curtsied to great kings" and went, leaving in their place, the Custom of the King's Court, or the Common Law.

CHAPTER II

THE NORMANS

With the political results of the Norman Conquest we are not directly concerned. "England itself," said Carlyle, "in foolish quarters of England, still howls and execrates lamentably over its William Conqueror and its vigorous line of Normans and Plantagenets; but without them, if you consider well, what had it ever been? A gluttonous race of Jutes and Angles, capable of no grand combinations, lumbering about in pot-bellied equanimity, not dreaming of heroic toil and silence and endurance, such as leads to the high places of this universe, and the golden mountain tops, where dwell the spirits of the dawn, etc." No doubt, and this despotic and unifying force produced also the Common Law and the Royal Justice.

Although the Conqueror's real title was the sword, he always claimed to be the right heir of the Confessor,* and it is said that he tried to learn English, that he might understand the complaints of his new subjects, but was too old.† He threw his half-brother into prison for oppression, and proclaimed that his subjects were to enjoy the same law as before he came. He was a man of orderly mind, and desired to rule over an orderly and peaceable kingdom: the enactments attributed to him are concerned with administration and police. But the English were intractable and rebelled continually; they suffered cruelly and were crushed into subjection, and continued to suffer.

The enactments of William preserved in a MS. attributed to the time of Henry I ‡ give no new law. He says that Normans and English are to be in his peace; that every one is to swear fealty to him, that Frenchmen who have come with him from

---

* *Saxon Chron.*, A.D. 1070. † Freeman, *Norm. Conq.* iv. 323.
‡ Stubbs, *Sel. Ch.* 83.

Normandy are to be specially protected, and if they are killed the hundred in which they are found is to be fined ; * every freeman is to have pledges bound to produce him if wanted ; every man is to enjoy the laws of King Edward ; if a Frenchman appeals an Englishman of certain grave offences, the Englishman may defend himself by ordeal of iron or by battle, and if he is feeble may find a champion ; if an Englishman appeals a Frenchman, and refuses ordeal or battle, the Frenchman may clear himself by an unbroken oath. Capital punishment, if not entirely abolished, is restricted, but mutilation is preserved.† No one is to be sold out of the country, and the sales of live beasts must be before witnesses.

The only other Ordinance preserved is that by which he separated the lay and spiritual jurisdictions. This had far-reaching results. No Bishops (or archdeacons) shall hold pleas of ecclesiastical discipline in the hundred Courts, such pleas are to be judged not by the law of the hundred, but according to the canons and the episcopal laws. No sheriff, royal minister, or layman is to meddle with ecclesiastical matters. No canon is to be enacted, and none of the king's barons excommunicated without the king's leave. ‡

The New Feudalism.—The nation owes, in one respect, a great debt to the Conqueror, he introduced Feudalism. The country was not wholly unprepared for something of the sort, but the sort was new. It was not the Continental feudalism, for that had proved to be a disintegrating influence. William's feudalism aimed at consolidation, for he knew the Continental system and its weakness. The King of all England (rex Anglorum), when he crossed the Channel to France, was the Duke of Normandy and a feudatory.

In France the fief was a piece of the empire of Charlemagne, military in its essence, the holding of which soon became hereditary, and these hereditary dukes and counts, under the feeble rule of Charles the Bald, Charles the Fat, and Charles the Simple, engrossed all provincial jurisdiction and nominally vassals, but really independent, reduced their sovereign to a nullity. In

---

* By the time of Henry I every dead man is presumed to be French, till his Englishry is proved. This was good for the revenue, for if a stranger is found dead, who can prove that he is English ?

† "Interdico ne quid occidatur aut suspendatur pro aliquâ culpa, sed eruantur oculi, et testiculi abscindantur." The King's Courts issued many "human documents," to witness to his justice and to praise his mercy.

‡ *Sel. Ch.* 85.

military matters, though the sovereign could call on his vassal to take the field with him, he could not call on his vassal's vassal. He had the *ban* but not the *arrière ban*. Moreover, it was the lord that presided in the Court of the fief, which administered the law of the fief. The jurisdiction which had originally been royal now became private and personal.

This disintegration was avoided in the modified system of the Conqueror. When he exacted the oath of fealty from all land-holding men at Sarum * in 1086, he could call all the freeholders of the country, of whatever lord they were the men, to come and serve him. He had the *arrière ban*. But military service is uncertain and irksome, and it was an arrangement agreeable to both parties, that in return for cash the State should allow the subject to escape personal attendance. It was so as long ago as Pericles. So when Ralph Flambard, the Justiciar, collected the ten shillings,† the " viaticum " provided by the shires, from the twenty thousand men who had mustered at Hastings to cross the seas, and then excused them from further attendance, the time was not far off when under the name of " scutage " ‡ it became the ordinary rule to redeem personal service in the army by the payment of money.

William rewarded his successful captains with large grants of land, but distributed their estates in different parts of the country. Had he not done so, the universality of solid feudal holdings must have introduced a general feudal judicature and feudal government with consequent disintegration. Even as it was, in the anarchy of Stephen's reign, the great feudatories had a measure of success in their efforts to get rid of the royal restraints. But Henry II came and that was the end of that.

It is worth noticing that though William got rid of the difficulty about the military summons, the baronage raised an analogous objection in respect of the judicial summons. The vassal's vassal, they said, must answer in the Court of his lord, and not in that of his overlord.§

That claim also in the end came to nothing.

---

* *Sel. Ch.* 82. † *Sel. Ch.* 129. ‡ *Sel. Ch.* 153.
§ *Mag. Ch.* § 34; *Sel. Ch.* 301.

CHAPTER III

THE INQUEST

ALTHOUGH William did not interfere with the old jurisdictions, he introduced a practice which, though not originally judicial in character, had a lasting effect on legal procedure. The Frankish kings were in the habit of sending out Royal Commissioners to discover the property of the "fiscus."* They made local inquiries, the neighbours were summoned and compelled to swear whether there was any Treasury property in their part of the world. This procedure, which we know as the Inquest, was used by William when he compiled that great revenue book which is called Domesday.† It was soon seen that here was a method available for the discovery of truth and fact of all sorts, and the Frankish kings had used it in their lawsuits in preference to other modes of trial. They preferred the verdict of the neighbourhood to battle or ordeal. A procedure they found so trustworthy themselves, they were ready to grant as a favour to others, and as it was a royal and privileged method granted it in return for payment.

When this rival appeared the methods of judicial inquiry which held the field were :

(i) ordeal ;
(ii) compurgation ;
(iii) evidence oral or documentary.

---

* The Capitulary of Louis le Débonnaire says that all fiscal inquiries are to be made in this way (*Anc. Lois Franc.* i. 69).

† See the Title of the Domesday Inquest for Ely (*Sel. Ch.* 86). "Not even an ox nor a cow, nor a swine was there left which was not set down in his records," says a Saxon chronicler.

(i) Ordeal appears in criminal cases down to 1184,* but in Henry II's time there is no record of it being used in civil cases, and in no form did it survive the condemnation of the Lateran Council in 1215.

(ii) The compurgators swore not to the facts of the case, but to the credibility of their principal, "By the Lord the oath is clean and unperjured which N. has sworn." Compurgation lingered on in civil cases till 1834,† in crime it was allowed to disprove accusations till 1166,‡ when the "implied prohibition" of the Assize of Clarendon destroyed it.

(iii) The witness spoke to facts "de visu et audito"—"In the name of Almighty God, as I here for N. in true witness stand, unbidden and unbought, so I with my eyes oversaw, and with my ears overheard that which I with him say." He, however, could only swear to what his principal asserted, and unless he was produced by the party, he could not give evidence at all, no matter how much he knew, and when produced was confined to the formula laid down in the interlocutory judgment. Charters were of the highest evidentiary value, if they existed, and excluded all other evidence except witnesses,§ though they might be supported by other evidence, especially if they were dilapidated.‖

Trial by battle was unknown in England before the Conquest, it was foreign and unpopular.

In this state of affairs the Norman king began to use the Inquest in his own business, *i.e.* for ascertaining royal rights, for discovering royal property, and getting information interesting to the royal mind. The king could direct its use whenever he pleased, and he allowed it to favoured churches.¶ It immediately came into use in litigation, though the occasions were at first exceptional.

The Inquest was a royal procedure, for none but the king could compel witnesses to take an oath (see 52 Hen. III, c. 22), it was the finding of facts by impartial men generally, if not always, on oath, and examined by an officer of the law acting under the king's

---

* Pl. Ang.-Nor. pp. 231, 233.

† 3 & 4 Will. IV, c. 42.

‡ See the case of Matilda. Pl. Ang.-Nor. 79.

§ *Abbot Athellelm* v. *Officers of the King*. Pl. Ang.-Nor. 30.

‖ Cf. Pl. Ang.-Nor. 27, "per cartas suas et per testes suos," and *Ibid.* 2, "justo dei judicio ac scriptis evidentissime detritis et penitus annihilatis."

¶ *E.g.* to the Abbot of St. Augustine. Pl. Ang.-Nor. 36, 66, to Bishop Robert, 139, to the Church at Ely, 24; and cf. P. and M. i. 122.

writ. It was required to be unanimous, and if, after being afforced, it could not agree, it apparently failed.*

---

* I extract one or two instances from Mr. Bigelow's books :

(*a*) A writ sent by William Rufus, in his father's absence, sent to the Sheriff of Kent, when the Abbot of St. Augustine complained that a ship had been taken from him. The writ directed an inquiry "per probos homines" whether the Abbot was seised of the ship when the Conqueror last crossed the sea. To this the honest men said "Yes," and thereon Rufus sent another writ ordering the Sheriff to give the ship back to the Abbot. "*Præcipio quod resaisias abbatem de Sancto Augustino de nave sua . . . et in pace teneat.*" (*Hist. of Procedure*, 179.)

(*b*) In *Bishop Gundulph* v. *Pichot* the shire gives judgment first, but the presiding officer, the Bishop of Bayeux, dissatisfied, directs it to choose twelve to confirm the judgment on oath. (Pl. Ang.-Nor. 34.)

(*c*) In the *Case of the Church of Ely* a Court is held of *three* counties, and an Inquest of Englishmen, who know the facts is directed. (*Ibid.* 16.)

(*d*) In *Bishop Robert* v. *Lord of Stowe*, the royal writ orders an inquest "per probos homines de comitatu," as to boundaries, "et si bene eis non crediditeris, *sacramento confirment* quod dixerint." (*Ibid.* 139.)

CHAPTER IV

THE NORMAN COURTS OF JUSTICE

THE local courts had been before the Conquest representative bodies, their judicial authority was from beneath, not from above. This position was for a time sustained after the Conquest, but the king by nominating the sheriffs gradually absorbed the management of affairs.

After the Conquest the supreme sovereign or appellate jurisdiction of the king is a great feature of government, and as business increased the justiciar took his master's place at the head of the Curia Regis.

The Curia Regis.—In its strictly feudal aspect, the Curia Regis was the Court to which the king's tenants owed suit and service; as the baron had his court for the freeholders of the manor, so the king had a court for his men who held of him, for feudalism was based on tenure.

But the name "Curia Regis" means more than this. It may mean those great assemblies of the nation, on the three great feasts of the Church—Easter, Pentecost, and Christmas—"when the king wore his crown." * It also meant an assembly of all the great men of the kingdom "congregatis in aula regali primoribus regni." † It was also applied to a meeting for business of the

---

* Stubbs, *Sel. Ch.* p. 81.

† *The King* v. *Earl Odo*, Pl. Ang.-Nor. 291. This was the remarkable case in which William accused his half-brother Odo, Bishop of Bayeux and Earl of Kent, whom he had left as Justiciar of England during his own absence on the Continent, of treason and abuse of office. The king, addressing the assembly, concludes thus: "Et frater meus cui totius regni tutelam commendavi violenter opes diripuit, crudeliter pauperes oppressit, frivola spe milites mihi surripuit, totumque regnum iniustis exactionibus concutiens exagitavit: Quid inde agendum sit caute considerate." The assembly, however, was a little shy of offering an opinion against so great a person: and noticing this the "magnanimus rex ait, Hunc virum, qui terram

king's household or personal attendants, and to the county court, when either the itinerant justice went down to it or sometimes when the sheriff presided, in the king's name, on the king's business.*

The king could also summon any one he pleased to give him counsel, whether he was his tenant or not. But attendance on the king was not a privilege to be desired, but rather a burden to be avoided. It was not a social distinction, nor a livelihood, journeys were not an easy matter, and travelling expenses were not paid.

As a consequence a smaller body, made up of capable persons, important persons, persons on whom it is as well to keep an eye, are always at Court, and they do the business of the kingdom.

This is Curia Regis, whether it expands in the great assemblies, or contracts to a departmental meeting.

To-day we speak of three great functions of Government being discharged respectively by the Crown in Parliament, the legislature, the Crown in Council, the executive, the Crown in the Law Courts, the judiciary, making, administering, interpreting law. These functions were then performed by the Crown in the undivided Curia Regis.

This smaller and more permanent body was the real government of the kingdom ; it represented the king, and if he was not there in person he was there in theory.† Under the name of the King's Council it lives through our history, throwing off depart-

---

turbat comprehendite," and when no one dared to move, the king himself arrested him, "rex ipse primus apprehendit eum." And when the bishop cried out "clericus sum, et minister Domini," and that as a bishop he could not be condemned without a judgment of the pope, the king, "providus rex," shrewdly answered that he was condemning not the prelate, but his own earl, whom he had placed over his kingdom : and sent him to prison where he stayed as long as William lived.

Such a meeting must in some aspects have been like a Durbar, say, at Cabul. In the service of Abdurrahman was an Englishman who was in charge of the Amir's stud farm. According to the story told in India, the Englishman had occasion to ask one of the Afghan chiefs for some help, and received an insolent answer. He attended the next Durbar and sat down. The Amir noticed him and said, "How are my affairs going ?" "Oh ! pretty well !" said the Englishman ; "but they won't if I get many more letters like this," and he handed the letter up. The Amir smoothed the letter out, read it, and his eyes wandered over the Durbar, till they found one of his feudatories. "Is this your letter ?" "Yes," said the man. "Cut his right thumb off." *Providus rex.*

* See P. and M. vol. i. p. 132 ; and Bigelow, *Hist. of Proced.* pp. 21 *sq.*

† *Abbot of Leicester's Case. Abb. Plac.* 2 John 32.

ments, yet retaining supremacy, throwing off functions of jurisdiction, yet keeping its original power unimpaired.*

Treasury—Exchequer.—In administration nothing is more important than Finance, and very soon we find the word "thesaurus" occurring—the Treasury—one cannot say that it is at first a separate department, it is rather a place—there is a local habitation and a name "in curia domini mei apud Wintoniam in thesauro." It was at first at Winchester, where at Easter the king wore his crown—and in it were kept Domesday Book, the *liber de Thesauro*, and the Great Seal. Great men attended, bishops and laymen, the Justiciar presided till his place was taken by the Treasurer, the Chancellor with the Seal, "the secretary of state for all departments."

About the middle of Henry's reign, A.D. 1118, the name changed, a department appeared with a staff of barones, the Exchequer or Scaccarium, with an improved method of accounting,† twice a year at Easter and Michaelmas the sheriff came to settle for the shire payments. He sat on one side of the chequered table and the barons on the other, and they played the game of exchequer chess with counters and tallies described in Mr. Hubert Hall's book. ‡

But it was not only financial business that found its way into the Treasury. Law and Revenue are nearly related, and the royal officials, ecclesiastical or lay, were not specialists. They were general practitioners, and could turn their hand to most things. The Treasury was a convenient place, for Domesday Book was there for reference, and the Great Seal if any instrument was wanted.§ Bear in mind that it was not till 1199 that the

* It was inevitable that in time there should be a divergence between the political ideals of the smaller body of official persons and the larger body where the territorial magnates mustered. The official objective was Centralisation; the baron desired immunity from interference. This divergence comes into view after the successful struggle with John had shown the barons that the Royal power could be resisted with effect. One might almost say that we find here the relation of his Majesty's ministers and his Majesty's opposition.

† The Dialogus de Scaccario tells us that before Henry I payments were made to the Treasury, not in gold or silver, but in kind. So oppressive was the system that when the king on his journeying the inhabitants used to meet him offering their ploughshares "in signum deficientis agriculturæ."; *Sel. Ch.* 193–4. Henry fixed a money payment for which the Sheriff was to account.

‡ *Antiquities of the Exchequer.*

§ In the case of *Periton* v. *Abbot Faritius* (*c.* A.D. 1109) an action to recover a manor in the Exchequer, three bishops and many barons were present. On the question of title reference was made to *Doomsday Book* (Pl. Ang.-Nor. 99).

Chancery separated from the Exchequer, and had Rolls of its own. But there were other reasons why it was worth money to get one's case tried before the Exchequer, or—to take one of many—why does an entry of the eighteenth year of Henry II say that Robert the son of Ernisus owes five marks for having his plea, which is between him and Hugo Malebisse, before the Justice ad Scaccarium ? * A successful plaintiff in the Exchequer was permitted to use the summary process proper for collecting crown debts, and it is probable that as the Exchequer sat in London, at least during its two financial sessions, litigants preferred to go there rather than "follow the court" on progress. It has been suggested that, as there was as yet no distinct Court of Common Pleas, the provision in Magna Charta that the common pleas should no longer follow the king was aimed at depriving the Exchequer of the litigious work which it had usurped. If that was the object it was hardly attained, for Edward I, in the Statute of Ruddlan, 10 Edw. I, prohibited the Exchequer from entertaining common pleas on the ground that this hindered them from attending to their proper business, which was the care of the king's revenue. "But for so much as certain pleas were heretofore holden in the Exchequer whereby as well our Pleas as the causes of our People are unduly prorogued and letted, we will and ordain that no plea shall be holden or pleaded in the Exchequer aforesaid unless it do specially concern us and our ministers aforesaid." But this prohibition failed, as will be seen hereafter.

The general legal business of the country was still transacted in the Shire Court. The real ruler of the shire, the president of its Court, was the Sheriff, or to give him his Latin name, Vice Comes.

The Sheriff.—The Norman Sheriff was indeed a formidable person. He was the king's outpost officer, he watched the king's fiscal interests, he accounted for the moneys due to the Crown from the county, he was the head of the military force of the shire (till he was displaced by the lord-lieutenant in the reign of Mary), he was responsible for the policing his county, and could call out the *posse comitatus* to arrest a felon, a power which he still exercises, I am told, in some States of North America. His judicial functions link him up with his Scotch brother of to-day. He was the Royal executive officer, to him came the Royal writs, and he executed them with all the weight of the Royal authority behind him.

---

* Pl. Ang.-Nor. p. 271. So also case of Robert de Hasting, 14 Hen. II. *Ibid.* p. 269.

The County Court in Saxon times met twice a year.* The rule was the same in the time of Henry I.† But the second reissue of Magna Charta, s. 42, A.D. 1217, says that the County Court is not to be held oftener than once a month. ‡ There is high authority § for the view that there was a combination of Anglo-Saxon and new Norman practice, and that the County Court was in Henry III's time held twelve times a year, and that two meetings were of greater importance, and to them most if not all freeholders owed attendance, while the other ten were of less account. The county also assembled to meet the justices in eyre, who came once every seven years, and then, it is conjectured, every one was expected to attend.‖ But this is largely speculation. The king also claimed the power to summon the local courts at his pleasure.¶ As attending courts, or making suit (*facere sectam*) was a burden, we can only surmise that few attended that were not bound to do so. And if it is asked who were bound, the answer is that the land was bound to provide suitors, so much land a suitor, but that between the lord and his freehold tenants it was a matter of private arrangement or of tenure who should do suit for the whole. It is believed that, perhaps in virtue of franchises of exemption, the suitors were divided into two classes, the one to go every month, the other only twice a year.**

When the itinerant justices came they sat in the County Court: they could sit nowhere else, for the county was their sphere of jurisdiction. To meet them the shire assembled with its fullest representation. The private jurisdictions and the franchises of exemption counted for nothing, and in addition to the persons above named, the chartered boroughs which owed no suit to the County Court sent their twelve legal men.††

The Court had jurisdiction in crime, tort, and debt; real actions came to it when the feudal courts made default in justice; it is disputed whether an appeal lay to it from the Hundred Court on similar ground.‡‡ It also had an original jurisdiction where

---

* Laws of Edgar, iii. 5. † Stubbs, *Sel. Ch.* p. 105.
‡ *Ibid.* p. 346. § P. and M. i. 526. ‖ *Ibid.* i. 531.
¶ Cf. Henry's Writ to Bishop Samson. Stubbs, *Sel. Ch.* p. 104.
** P. and M. i. 526.

†† In 1259, by the further Provisions of Oxford, the bishops and barons were excused attendance at the County Court. But so imperceptible had been the change from local to royal justice that the great men of the county thought they had a right to sit on the bench at the Assizes. This was forbidden by 20 Ric. II, c. 3.

‡‡ Cf. Bigelow, *Hist. of Proced. in Eng.* 135, and P. and M. i. 544.

the vassals of two lords were litigating "de divisione terrarum." * It was only in that Court that a man could be "exacted," and that outlawry could take place. In it all the county business was transacted. When it sat judicially the sheriff was the president, but the suitors made the judgments, which the sheriff announced, and it was the county that was amerced for a false judgment.

If a case was of great importance several shires could be summoned to try it.†

The Hundred or Wapentake Court met originally once a month,‡ but a Royal Ordinance of 1234 § declares that it is to meet but once in three weeks instead of every fortnight as heretofore. The practice had at some period changed. Here again we are in doubt as to who attended these numerous sittings. We must be content to say that those freeholders of the hundred came who were bound to come and do suit. The number might be very small, sometimes as low as twelve. ‖ The hundred tried personal actions "causæ singulorum," ¶ and appeals "de pace regis infracta," probably of a small sort.** It was presided over by the bailiff, who was the sheriff's deputy, and the suitors were the judges.

Twice, however, in the year the sheriff held a full Hundred Court, when, according to the laws of Henry I, all free men must be present,†† to ascertain *inter cetera* if the tithings or "decaniæ" were full, in other words, to hold a "view of frankpledge."‡‡ In practice it seems to have been enough if the head men were present. The sheriff at the same time made inquiries as to crimes committed since his last visit, and each vill in the hundred appeared by its reeve and four men, and presentments were made §§ in answer to

---

* Stubbs, *Sel. Ch.* p. 104.

† *Bishop Odo* v. *Walter of Evesham.* Pl. Ang.-Nor. p. 20.

‡ Edgar, i. 1. § Stat. i. 118.

‖ See P. and M. i. 544.

¶ Stubbs, *Sel. Ch.* p. 105. Leges Hen. I, 7, § 8.

** *Rot. Cur. Reg.* 205, 207.

†† Stubbs, *Sel. Ch.* p. 105. Leges Hen. I, 8, § 1.

‡‡ The frankpledge system was a great police organisation. Every one over twelve years of age must belong to a tithing, *i.e.* a group of persons, ten or more, under a head man, all mutually responsible for the offences of the others, and bound to produce the offender if called on. It was the sheriff's duty to see that the law was complied with, and this duty he discharged twice a year on his "tourn." A lord's household (*familia sua*) was in his frankpledge. Should a manor have among its franchises a "view of frankpledge," the sheriff can hold no "tourn" there, the right to hold the Court being in the lord. Such a Court is known as a Court leet.

§§ Cf. Assize of Clarendon. Stubbs, *Sel. Ch.* p. 143.

the sheriff's set questions, known as the "articles of the view," of a character similar to the "articles of the eyre." The hundred had to provide a jury of twelve at the least, who confirmed or rejected the presentments. The smaller offences were then summarily dealt with by the sheriff, by fines, which were settled or "affeered" by two of the suitors. The graver crimes were kept for the king's justices, the sheriff arresting the accused persons. Meetings of this character were at a later date known as the "Sheriff's Turn."

The Manorial Court was of the same rank as the hundred courts. In it, in virtue of a jurisdiction inherent in the feudal relationship of a lord and his tenants, were triable personal actions not exceeding the value of 40*s*., and actions affecting land of the manor.* It had frequently a criminal jurisdiction, but the extent of its jurisdiction varied, and depended on the royal charter which conferred the jurisdiction; or, in the absence of a charter, on the long-established practice of the Court. In some cases these baronial franchises were so extensive as to found a claim for excluding even the king's justiciar.†

It was not till the reign of Edward I that the jurisdiction which remained in the manorial courts was seriously questioned. By means of the statute of *Quo Warranto* the Crown called on every one to show title for liberties that they claimed; and the Crown lawyers distinguished between *libertates* and *regalia*. These latter, such as view of frankpledge, could only be held by royal grant; the others, such as jurisdiction over manorial offences, *e.g.* ploughing badly, flowed from tenure. In the face of violent opposition Edward compromised in 1290, and agreed that continuous exercise from before the coronation of Richard I should be a good answer. But his action stopped further encroachments.‡

---

* See P. and M. i. 574.

† We find in the rolls of the King's Bench in the time of Richard I, in a case where Agnes de Bascoville demands the castle of Bredewardine, in her right and inheritance of which Robert de Wastre deprives her, the Sheriff of Hereford is ordered to take the castle into his hands. He says it is out of his bailiwick, and he dare not meddle, and "William de Braosa says that neither king, justice, nor sheriff, ought to lay their hands on his franchise. The case is adjourned *sine die* till the pleasure of our lord the king is known hereon" (Palg. *Rot. Cur. Reg.* i. 426).

‡ "Rex vicecomiti salutem. Summone per bonos summonitores talem quod sit coram nobis apud talem locum in proximo adventu nostro in comitatu prædicto vel coram iustitiariis nostris ad proximam assisam cum in partes illas venerint ostensurus quo warranto tenet visum franciplegii in manerio suo de N. et habeas ibi hoc breve."

There remain **the Forest Courts.** The woodlands, with extensive additions, had been enclosed by the Conqueror and his sons, and rules for the protection of them and the beasts of the forests, "cruel to man and beast," * had been made, notably by Henry I. No records tell us the details of the forest jurisdiction at its commencement, but the whole matter lay outside the ordinary law, and the justice administered was summary and, if we may draw an inference from its unpopularity, harsh and without much redress. Its aim was the preservation of vert and venison. The Selden Society has published a volume of Pleas of the Forest,† beginning in the tenth year of John, to which the learned editor has written a full and admirable preface, showing, amongst other things, what the forest system was when it became settled. In 1238 there were two justices of the forest, one for the north of the Trent, one for the south. Hitherto there had usually been one official, the *capitalis forestarius*.‡ Their duties were mainly ministerial, their chief function being to decide on the release on bail of offenders against the forest rules. Such persons could only be released by them or by the king. Under them came the wardens of the various forests, who were the executive officers of the king, and who were the recipients of his writs; there were also verderers, knights or men of substance elected in the County Court and responsible to the king, their duty being to attend the forest courts; then there were the foresters (who were gamekeepers, and who paid for their offices and repaid themselves by extortion under the name of customary payments), the regarders and the agisters.

In the forest "attachment" courts were held. If the forest contained more than one bailiwick, each had its Court and four verderers, and the Court met as a rule every forty-two days. These

---

* Stubbs, *Sel. Ch.* p. 156.

† *Select Pleas of the Forest*, ed. J. F. Turner.

‡ See the case of *Abbott Walter* v. *Allan de Neville* "qui præerat domini Regis forestariis." Alan was a bad man vexing all England "innumeris et insolitis quæstionibus. Nec deum nec homines verebatur," and among other iniquities he had forcibly collected monies on the lands of Battel Abbey for clearings ("vi exegit"). The money had been paid into the exchequer, but was recovered by the Abbot who produced charters to the Court. Alan does not seem to have been disturbed, and the office remained in his family. The monkish chronicler says that, on the death of this valuable servant, when a certain monastery sought a portion of his goods, the king said "I shall have his wealth, but you may have his carcass, and the devil may have his soul." —Bigelow, *Hist. of Proced.* p. 146 n.

courts were of little jurisdiction : they could not inquire into cases of venison but only into minor offences against the vert, for which the offenders were duly amerced. If there was a serious trespass to the vert, the offender, if an inhabitant of the forest, was put under pledge to appear at the first eyre ; if a stranger, he went to prison, whence he could only be bailed by a justice, or by the king.

When a trespass had been committed to the venison, *e.g.* when a beast of the forest was found dead or wounded, there were special forest inquisitions of the four neighbouring townships before the verderers and foresters. The accused was either sent to prison or attached to appear before the justices in eyre, the four towns and suspected persons being attached also.

After 1306 an institution recognised by statute and known as a general inquisition or a "swanimote" became settled. This was held before the justice of the forest or his deputy, and was made by the forest officers and a body of jurors in respect of such offences as had recently been committed. These inquisitions were held at no fixed intervals, and probably at the pleasure of the justice.

The Forest Eyre was held under letters patent appointing justices to hear and determine pleas of the forest in particular counties. To it were summoned all, great and small, having land in the forest, the reeve and the four men, the verderers and foresters, with all the attachments. In the time of Henry III seven years seems to have been the proper interval, but it gradually became longer. Its business had a strong financial aspect, being mainly concerned with amercements levied for forest offences, and for wrong or insufficient presentments. If offenders failed to appear they were "exacted" and outlawed in the County Court.

Summary.—To recapitulate : the royal justice was still mostly extraordinary, and by that is meant that the king's court was not to be approached except in the last resort. This had been so in Anglo-Saxon times, for we find in the ordinances of Edgar "let no one apply to the king in any suit unless he at home may not be worthy of law or cannot obtain law : if the law be too heavy let him seek a mitigation of it from the king." * So again in the Secular dooms of Canute, we find "and let no one apply to the king unless he may not be entitled to any justice within his hundred," † or in the Latin form in which it appears in the laws of the Conqueror, chap. xliii, "Nemo querelam ad regem deferat nisi ei ius defecerit in hundredo

---

* Stubbs, *Sel. Ch.* p. 71. † *Ibid.* p. 73.

vel in comitatu." Appeal in our sense of the word there was not. The petitioner could not ask the king to reverse a judgment of the county. He must allege either that he could not get a judgment, or that the court had usurped jurisdiction, or that the judgment was openly flouted.

Although the King's Court was, for ordinary people, an emergency court of last resort, it was more than this. As a court of first instance, it tried pleas of the Crown (*placita Coronæ*), that is, cases in which the king was or claimed to be interested. This class was ill-defined and elastic, it included naturally infringements of the king's proprietary rights, a varying list of crimes, and breaches of the king's peace, all sources of forfeitures or fines. Moreover, certain persons went there in the first place. The great nobles, bishops, and archbishops disdained the jurisdiction of a court presided over by some one very much inferior in rank to themselves. It is probable that the clause in Magna Charta concerning "iudicium parium" was really due to the dislike of the great barons to come into a court presided over by the royal judges, who were, apart from their official position, persons of no great account. It was, moreover, good feudal doctrine that no one was bound to answer in any court but the court of his own lord. These great nobles were all tenants of the king; and to the King's Court they naturally resorted. The principle that the King's Court is open to all comers who seek justice, and to all cases great and small, can hardly be considered as established much before the reign of Edward I. At this early period the King's Court may be said truly to be "the court of great men and of great causes."

CHAPTER V

THE DECLINE OF THE LOCAL COURTS AND THE ROYAL WRIT PROCESS

Rise of a "Common Law."—The period which lies between William I and Edward I was the time during which the royal justice gradually dwarfed and finally superseded all other justice, with the result that there was produced a common law of the land. The time had come for Wessex, Mercian, and Dane law, to give place to the common law of England ; and, with the exception of the customs of Kent, the one surviving custom was the custom of the King's Court.

The "King's Court."—The title of "King's Court," or of "Royal Court of Justice," was no mere courtesy style. The personal connexion between the sovereign and his courts of law lasted till very late. Both Edward I and Edward II sat in court and decided cases, and the claim of James I to do the same was only one example of his efforts to revive obsolete prerogative, another aspect of the same pretension being provided by Bacon's attempt to use the writ *ne Rege inconsulto* to stop arbitrarily in any court any proceedings in which the Crown affected to have an interest. Till the Act of Settlement * provided otherwise, the judges of the King's Bench and Common Pleas held office during the royal pleasure, and were dismissed if they decided against the king's wishes. Till the sixth year of Anne they vacated their places if the sovereign died. In that year a statute † gave them six months after the demise of the Crown, and it was not till 1760 ‡ that their tenure was made independent of the sovereign's life. Till a statute of Edward VI § made the alteration, the death of the sovereign caused a discontinuance of all actions in his courts.

---

* 12 & 13 Will. III, c. 2. † 6 Anne, c. 7. ‡ 1 Geo. III, c. 23.
§ 1 Ed. VI, c. 7.

The local courts, as Maitland said, nominally entertained all pleas *exceptis excipiendis*, *i.e.* those which the king reserved from time to time.* But now the Royal Justice, which had been extraordinary, was to become ordinary, and the king had ready to his hand the officer and the weapon, the Sheriff and the Writ. Of the sheriff we have already spoken.

The Royal Writ.—The Writ was the king's order to his liege written on parchment and sealed with the Royal Seal, and disobedience to it was a contempt of the royal authority and punishable as such. Like the inquest it was originally used for royal purposes, but, like the inquest, this good weapon was purchasable by the subject. It superseded all other processes and is in use to-day. Being a written document it could be registered. A king's officer kept the Register, which was available as a book of precedents.

The precedents show that these orders were of all sorts, and it never seems to have been suggested that the writ was insufficient on any ground, or that it could safely be disobeyed. Such was the nature of the kingly office, buttressed by the allegiance of the subject, and sanctified by the Church. The king is the fountain of justice, his word is law.

These writs were not at first necessarily judicial. They were mandates † addressed to his officer or his subject to do something. They do not, said Maitland, institute litigation, litigation only follows if they are neglected.

A few early instances will suffice. A. is to hold certain lands; if anyone turns him out, the sheriff is to put him in again.‡ The king orders fugitives from the Abbot of Abingdon—wherever found—to be restored.§ C. is told to perform the customary services of his land to D., if he does not D. is to be allowed to help himself.‖

---

* When Glanvill wrote his treatise toward the end of Henry II's reign he was able to divide criminal pleas into those which belong to the Crown and those which belong to the sheriff. The Crown takes treason, homicide, arson, rape, forgery, and such like. Petty crime, theft, scuffles, blows, and wounds, go to the shire court on default of the hundred or manorial court. (Glanv. lib. 1, cc. 2, 3, lib. 14, c. 1–7.)

† The term "mandamus," derived from these letters missive, was gradually confined to the writ issued by the King's Bench, which has developed into the present prerogative writ of mandamus.

‡ Pl. Ang.-Nor. p. 108.

§ *Ibid.* p. 94.

‖ *Ibid.* p. 97. A curious case is that of *Modbert* v. *the Prior and Monks of Bath* (1121) (Pl. Ang.-Nor. p. 114). The writ, or as it is called, "literæ cum sigillo regis," comes down to the Bishop of Bath. The king is abroad, so

These writs are in their nature, writs of *execution*, they issue without preliminary judicial proceedings, on any complaint to the king which he thought well founded, though without prejudice to further consideration of the matter. There is the case of the *Church of Abingdon* v. *William*, in which one William complained to Henry I that the late Abbot Faritius had turned him out of a mill. Whereon "regis mandato," he was given seisin; but afterwards the king, having been approached by the monks, and "having learned the truth," ordered the Church to be put back in its seisin.* Here it seems clear that no judicial investigation had preceded the issue of the writ.

The reign of Henry II was fatal to the local courts. Besides the particular enactments mentioned below, there had grown up the doctrine that neglect of the king's writ has this result, that the cause of action is not merely the wrong done to the plaintiff but the wrong coupled with a contempt of the king's order, and this made the case properly triable in the King's Court. In the *Leges Henrici Primi* among the pleas of the Crown is the *placitum brevium vel præceptorum ejus contemptorum.* The wrong to the plaintiff is a wrong to be redressed somewhere, but it is the contempt of the king's writ which makes it a wrong which should be redressed in the King's Court.†

We may now enumerate the various enactments which reduced the local courts to insignificance:

1. The writ Præcipe.

---

his son sends the writ. "Willelmus filius regis Iohanni episcopo de Batha salutem. Præcipio ut saisias Modbertum iuste de terra quam tenuit Grenta de Stoca, sicut hæreditavit eum in vita sua." The plaintiff says that he was the adopted heir of the late owner, and so is entitled to the land. The defendants say that the dead man was only a tenant for life under them, and surrendered before death. They produce witnesses, and also a charter. The bishop, apparently observing the word "iuste" in the writ, says that he agrees, and will obey the writ "si tamen iustum est," and proceeds to try the case to see if it is just. The parties contradict each other, a great discussion ensues, and the decision seems far off. The bishop says, "the day is getting on, and we have other things to do," and sends apart some who are older and more skilful in the law than the rest. They say the plaintiff must produce either a charter, or two witnesses against interest. He fails to do so, and the court then breaks up. A report of the proceedings is sent to the king and down comes a writ to the bishop commanding that the monks do hold their land in Stoke, "in pace et iuste et honorifice," according to the judgment. It seems that there would have been no inquiry had it not been that the word "iuste" occurred, which the bishop interpreted as making the order conditional.

* Pl. Ang.-Nor. 130. † Maitland, *Equity*, 319.

2. The writ of right in the lord's court and the *nisi feceris* clause.
3. The writ of right *quia dominus remisit curiam.*
4. The allegation "*vi et armis in pacem Domini Regis.*"
5. The Grand Assize.
6. The Petty Assizes.
7. The "Tolt."
8. The "Pone."

1. The Præcipe.

This writ had been invented before Glanvill's time and was addressed to the sheriff. It began with the words "Præcipe N. quod reddat," *i.e.* Command N. to render something, and if he does not, bid him appear at Westminster before me to show why not.

The writ originally issued show a man complained to the king either that a lay debt * was not paid him, or that he had been deforced of his land which he held as the king's tenant *in capite* (præcipe in capite).†

To the *præcipe in capite* no objection could be raised for the King's Court was the proper tribunal for the king's tenant, *in capite*. But Henry II went further and sent the *præcipe* to the sheriff when the complainant was the tenant of a mesne lord, thus taking the case out of the lord's court. To this the barons violently objected, and a clause was inserted in Magna Charta forbidding it.‡

If it was not desired to try a plea of the Crown at Westminster the king could by issuing the writ of "justicies" direct the sheriff to try a case which as sheriff he could not

---

* As opposed to debts supposed to be of a spiritual nature, such as money due on a legacy, or on a promise of marriage.

† "Rex vicecomiti salutem. Præcipe *N* quod iuste et sine dilatione reddat *R* centum marcas quas ei debet ut dicit et unde queritur quod ipse ei iniuste deforciat, et nisi fecerit summone eum per bonos summonitores quod sit coram me vel iusticiis meis apud Westmonasterium a clauso Pasche in quindecim dies ostensurus quare non fecerit: et habeas ibi summonitores et hoc breve." (Glanv. lib. 10, c. 2.)

"R. v. s. Præcipe *A* quod sine dilatione reddat *B* unam hidam terræ in villa (naming it) unde idem *B* queritur quod prædictus *A* ei deforciat et nisi fecerit, et." (Glanv. lib. 1, c. 6.)

‡ "Breve quod vocatur Præcipe non fiat alicui de aliquo tenemento unde liber homo amittere possit curiam suam." (M. C., c. 34.)

try. Under the writ he acted as a royal judge (non sicut vicecomes sed sicut justitiarius regis).*

As this writ was not returnable to Westminster, but stayed down in the sheriff's court, it was called "Vicontiel."

2. The writ of right in the Lord's Court, and the "nisi feceris" clause.

Henry II enacted that *no man need answer for his freehold without a royal writ.* If the plaintiff claimed lands which the defendant held of a mesne lord, the case was properly triable in the lord's court. But the defendant need pay no attention unless the plaintiff came armed with the king's writ. The *præcipe* was no good, for it took the case to Westminster. So they invented the writ of right (breve de recto tenendo) which was addressed to the lord and directed him to do "full right" to the plaintiff in his court, and "if you do not" "nisi feceris the sheriff shall." The lord was thus exhibited as a mere official of the king.†

3. The writ of right "quia dominus remisit curiam."

According to FitzHerbert,‡ the lord might give a licence to his tenant to sue out his writ of right in the King's Court, "remitting his court" for that turn to the King's Court, whereupon issued the writ returnable before the King's Court "quia dominus remisit curiam." In the end the mere insertion of this clause, irrespective of its truth, was held to give the Common Pleas jurisdiction.

It was not unknown, says Glanvill, for a lord to adjourn a case of difficulty to the King's Court "curiam suam ponere in curiam domini regis," and having got direction to return and try it in his own court.§

---

* "R. v. s. Præcipio tibi quod justicies *U* quod juste et sine dilatione faciat *R* consuetudines et recta servitia quæ ei facere œbet de tenemento suo." (Glan. lib. 9, c. 10.)

† "Rex comiti *W* salutem. Præcipio tibi quod sine dilatione teneas plenum rectum *N* de decem carucatis terræ in *M* quas clamat tenere de te per liberum servitium (or whatever the tenure was) quas *R* filius *W* ei deforciat. Et nisi feceris vicecomes de *N* faciat ne amplius clamorem audiam pro defectu iustitiæ." (Glanv. lib. 12, c. 3.)

‡ Nat. Brev. 23.

§ Lib. 8, c. 11.

4. The allegation "vi et armis contra pacem."

Thefts, scuffles, blows, and wounds were in the jurisdiction of the sheriff or the manor. But Glanvill * says "to the Sheriff in the county court belongs the cognisance . . . of scuffles, blows, and wounds *unless the plaintiff allege that the act was* "de pace Domini Regis infractâ." † So that if the plaintiff chose to insert these words (and they could not be traversed) in his complaint, whether civil or criminal, the King's Court took cognisance and the sheriff's jurisdiction was ousted.

5. The Grand Assize.

The writ of right raised the question of *ownership* of land. The action was normally tried in the lord's court, and the normal method of trial was by battle,‡ the demandant in the writ of right putting forward a champion who testified either of his own knowledge, or in obedience to the orders of his dead father, to what his father had seen, and who offered to prove by his body. At some date not exactly known Henry issued the Grand Assize,§ which ordained that when the demandant put in his claim in the lord's court and offered battle, the tenant in possession could, if he chose, decline battle and have the action removed into the King's Court, and the whole question of title determined by lawful knights of the shire. The tenant thus "put himself on the Grand Assize" and escaped the manorial jurisdiction altogether.

---

* Lib. 1, c. 2.

† According to A. S. law every man had a "mund" or "peace" of his own, and to break this was an offence and must be paid for. In the case of an ordinary man, this would include his house and household. Greater men would take into their "peace" smaller men. The greater the man, the more expensive is his peace. At the top is the king, and his peace is the best of all. At first it is not universal but patchy. The king may grant it for certain persons, places, or seasons. The four great highways have it. To break the king's peace is to offend directly against the king.

‡ Battle was sometimes prohibited by local usage, *e.g.* at Ipswich. *Bl. Bk. of Ad.* ii. lxxi.

§ "Assisa" means first, an assembly judicial or legislative, next a judgment or ordinance, then it became appropriated to the specific "assizes," and was used commonly as equivalent to a "jury," as in the expressions "assisa venit recognitura," "assisa vertitur in iuratam."

The procedure was as follows. When the demandant opened his claim the tenant could decline the duel and put himself on the Assize (in Assisam se posuit), and demand the writ *de pace habenda*, which restrained the demandant from taking further steps in the original process. The demandant was thus remitted to an auxiliary writ, which summoned four knights of the county and neighbourhood that they might choose twelve other knights of the same neighbourhood to swear which had the better title.* Any that swore that they knew nothing about the matter were discharged; if the ultimate twelve disagreed they were "afforced" till twelve did agree. They swore to what they knew by their own eyes and ears, or by hearing it from their fathers, or some equally credible source.†

This action, though it finally disposed of the question of ownership, was very slow, for the tenant in possession might call his warrantor, and he his, and so backwards, and if the tenant was a minor, that fact might hang the suit up for twenty years, when at last it would be settled by battle or by the Grand Assize.

6. The Petty Assizes.

(a) **Novel Disseisin.**—In 1166 Henry issued the most important of the Petty Assizes, that of *Novel Disseisin*, which provided that if A. had been disseised of his free tenement by B. since a certain date unjustly and without a judgment, he was to be *without further question* replaced in his seisin.‡ A jury of twelve "legates homines" of the neighbourhood were under the original writ summoned by the sheriff and directed to answer the plain question of fact. Has Earl Godfrey without a judgment turned James Clerk out of his freehold since the king's Coronation? If they said "Yes," James was put in again, and the Earl was fined (in miseri-

---

* There is some dispute whether the four original knights were added, making a jury of sixteen. Perhaps this occurred later. Glanvill gives no warrant for this view. For the ceremony of choosing see Y. B. 7 H. IV. 20, 28.

† Stubbs, *Sel. Ch.* 161. Extracts from Glanvill. The Grand and Petty Assizes disappeared with the abolition of real actions in 1833.

‡ "Unjustly" here is synonymous with "without a judgment." No further question of justice was left to the jury.

cordia). If they said "No," James was fined "pro falso clamore." *

By this ordinance *possession* as opposed to *ownership* was given a rapid remedy, and the seisin of a free tenement was protected by the king no matter of what lord it was held.

Although this Assize was originally intended as a remedy for an ejected person, it was by the end of Henry III's reign used as an action for damages for *any trespass* which the plaintiff chose to call a disseisin.†

The object of the Assize is plain. If B. thinks that A. has no right to possession, he must bring an action and try the title in a peaceable manner; he must not help himself and turn A. out.

(b) **Mort d'ancestor.**—Ten years later a second possessory or petty assize was issued,‡ the Assize of *Mort d'ancestor*. According to this Assize if A. has died seised as of fee, that is, holding possession of a tenement, not as a mere life tenant, but, in other words, as though the title were descendible to his heir, his heir is entitled to be put into possession as against every man, irrespective of the goodness of his ancestor's title. If C. has a better title he must go to law and not step in in front of the heir.

The "legales homines" were asked, Was John the father of Roger Sutton seised as of fee of a field at Weston? Did he die since the date fixed by the ordinance? Is Roger his next heir? No question of "jus" is left to the jury; whether John was seised *de jure* was immaterial.§

The Assize was restricted, for at first none could be

---

* "Assisa venit recognitura si Galfridus Comes de Pertica iniuste et sine iudicio disseisivit Iacobum Clericum de libero tenemento suo in Chaltona post primam coronacionem domini Regis.

"Iuratores dicunt quod comes disseisivit eum.

"Iudicium: comes in misericordia et Iacobus habeat seisinam suam."—(Pipe Roll Series.) Rolls of the King's Court in the reign of Rich. I, xxxii–vii.

† P. and M. ii. 53.

‡ Assize of Northampton (1176), c. 4.

§ "Assisa venit recognitura si Iohannes pater Rogeri de Suttona fuit seisitus in dominico suo ut de feodo die qua obiit de una carucata terræ cum pertinenciis in Westona; et si obiit infra assisam et si idem Rogerus proximus heres eius sit. Quam terram Thomas de Nortona tenet.

"Iuratores dicunt quod non obiit inde seisitus [*or* quod Rogerus non est proximus heres suus].

"Iudicium: Rogerus in misericordia, et Thomas teneat quietus."

plaintiff who was not son, daughter, brother, sister, nephew or niece of the ancestor ; some fifty years later supplementary actions on " Præcipe quod reddat " were given in regard to the seisin of a grandfather, great-grandfather, great-great-grandfather and a cousin (aiel, besaiel, tresail, and cosinage) : the limit of time was the same as in *mort d'ancestor*.*

The second Assize was complementary of the first, but the two combined did not cover all cases of wrong to possession. The Assize of *Novel Disseisin* could be brought only when both disseisor and disseisee were alive. The heir of the disseisee could not be plaintiff, nor the heir of the disseisor the defendant. But if the disseisor was alive, the disseisee could successfully join him and any one who was in possession through him. If the disseisor was dead, the disseissee must wait till the law invented the " writ of entry sur disseisin."

The heir of the disseisee was also assisted. The disseisee himself was allowed four days after the disseisin to go north, south, east, and west, collect his friends, and forcibly repossess himself. If he died within that time, he died seised. His heir had a longer time allowed for self-help, apparently a year. If the heir had himself taken seisin, he brought novel disseisin ; if he was ejected immediately after the death, he had his choice between the two assizes.† Finally the law gave him the " writ of entry sur disseisin," and the " writ of entry sur disseisin in the post," ‡ as against any one in whose hands he found the land.

(c) **Darrein Presentment.**—These Assizes were not the first in order of date. Two earlier ordinances touched the Church—the Assize of *Darrein Presentment* and the Assize *Utrum*. Their date of origin is obscure : they are both referred to in the *Constitutions of Clarendon* (1164), and there is evidence that something like the latter was known in the time of Stephen.

The first dealt with advowsons. The king says that he who presented last time shall present this time also, but without prejudice to any question of right. The neighbours are summoned to declare who presented last.§

---

* P. and M. ii. 57. † Glanv. 13, 11. Bract. f. 273.

‡ *Vide* P. and M. ii. 52-65. In 1259 damages could be given in mort d'ancestor. *Ibid.* ii. 59.

§ " Quis advocatus tempore pacis presentavit ultimam personam quæ mortua est ad ecclesiam de Westona cuius advocationem Rogerus de Suttona petit versus Thomam de Nortona."

In its working this Assize had two edges, for the king claimed as against the Church that such litigation was temporal, and as against his feudatories that it belonged to the King's Court.*

(d) **Utrum.**—The Assize *Utrum* † was employed in the following case. The Church claimed for her courts all litigation about land which had been given by way of alms to her ; and the preliminary question naturally arose whether as a fact, in any particular case, the land in question was lay or not. The impartial country-side was then called upon to say "Yes" or "No" to that question.

These Assizes were commenced by the plaintiff getting the royal writ ordering an inquiry and directing the impannelling of the twelve "legales homines."

The royal ordinances had these results, (i) none could be disseised of his free tenement "iniuste et sine iudicio" ; (ii) none could be disseised of his free tenement, even by a judgment, unless summoned by a royal writ ; (iii) none could be compelled to defend his title to a free tenement by battle. The claimant offered battle, but the tenant might decline.

The King's Court thus took jurisdiction over all serious crime, over all disturbance of seisin, and over ownership of freehold, while in reserve was the clause "quia dominus remisit curiam." The new writs of entry could only be brought in the King's Court. And the story does not end here.

By the Provisions of Westminster (1259), confirmed by the Statute of Marlborough (1267), no lord might compel his freeholder to swear against his will ; the lord could not therefore impannel a jury of freeholders without their consent ; the king both could and did. None but the king could hold a plea of false judgment ; thus no appeal lay from lord to overlord, and the overlord's court became valueless ; ‡ there was no right to distrain and sell, and by the Statute of Merton the lords were deprived of their prisons.§

7. The Tolt.

A cause was removable into the county court from the lord's court, either for defect of right or with the lord's

* Cf. *Const. of Clar.* cap. i.
† *Ibid.* cap. ix.
‡ 52 Hen. III, cc. 19, 23.
§ 20 Hen. III, c. 11.

consent, by the sheriff's precept called a "Tolt," "quia tollit et eximit causam e curia baronum."

These measures chiefly affected the manorial courts.

The Decline and Fall of the Sheriff.—The sheriff's jurisdiction was doomed also. The shire court was unpopular; though most of the suitors were Saxon, the language spoken was French. The Normans were greedy, the sheriffs often partisan: some of them were hereditary officials, and although a few of them were satisfactory,—some of them were justices of the king,—the system had not proved a success; and a crisis came when Henry II (in 1170) ordered the Inquest of sheriffs * and removed the majority of them from their offices, acting on the grave complaints, which he heard on all sides, of their misconduct and extortion, "pro eo quod male tractaverant homines regni sui." † Magna Charta said that the sheriffs were not to hold pleas of the Crown, and thus swept away the most important part of their criminal jurisdiction,‡ the justices of the peace eventually took away the petty crime, and in the reign of Edward I almost the last blow was given, for a clause in the Statute of Gloucester, 1278, prohibited suits for goods in the King's Court unless the goods taken away were worth 40*s.* at the least. This clause, though probably designed to relieve the King's Court, was ingeniously construed to mean that no action for more than 40*s.* should be brought in a local court, or at any rate that the suitor must take out a royal writ to the sheriff, without which the sheriff could not act. As the writ issued from the King's Court and had to be paid for, it was just as cheap to go straight to the King's Court and try the action there.

---

* Stubbs, *Sel. Ch.* p. 147.

† Pl. Ang.-Nor. p. 216. See, however, that the chronicler says that the king replaced some of them, "atque ipsi postea multo crudeliores exstiterunt quam antea fuerunt."

‡ This clause was held apparently to apply only to "hearing and determining," and not to the sheriff's power to receive indictments in felonies and misdemeanours and arrest and imprison thereon. This was set at rest by 1 Edw. IV, c. 2, which gave this authority to justices of the peace only.

8. Pone—Error—Recordari facias.

If the King's Court desired to call up a cause from the sheriff's court, it did so by a writ of "Pone." *

If after judgment in an inferior court it was sought to establish error, the record was ordered up to Westminster to be examined for errors on its face. If, however, this court had not the privilege of keeping a record—some county courts had and others had not (the itinerants are said not to have had it)—the judges were directed to make a record and bring it up.†

---

* "Rex vicecomiti salutem. Pone coram me vel iustitiis meis die, etc., loquelam quæ est in comitatu tuo inter *A* et *N*, etc." (Glanv. lib. 6, cc. 6, 7.)

† "Præcipio tibi quod recordari facias in comitatu tuo loquelam, etc." (Glanv. lib. 8, cc. 6, 7.)

CHAPTER VI

THE ITINERANTS

THERE was another royal practice which prejudicially affected the local courts. It was not enough that the people were free to seek the Royal Justice, for travelling was difficult. It must be brought to them, "An extraordinary and occasional procedure was transformed into a regular and ordinary system of justice brought to the suitor's door."* A comparison of the old and the new systems side by side spoke for itself. In the King's Court there was an impartial judge, attendance could be compelled, and recognitors could be sworn; in the county court the judges were the suitors, compurgation was in use, and the sheriff might be partial or corrupt. The king was offering a superior article, with the natural result that he took the business.

The Eyres.—These "itinera" or eyres were not at first necessarily judicial. The royal emissaries (missi) were sent on financial errands—Domesday Book was compiled from their reports—and though in time the expression "eyre" came to have a legal flavour, the business of any particular eyre was settled by the terms and scope of the Commission, which might be narrow or extensive, it might be confined to taking the Petty Assizes, or it might include the whole administration of justice, civil and criminal, and investigation of all the sources of royal revenue, and assessments for taxation.

William I occasionally sent some down to try an important case: Rufus sent Bishop Walkelin and his chaplain Flambard into the West Country "ad investiganda regalia placita," and we know that they heard a suit on behalf of the king for a certain manor which was held by the Abbot of Tavistock.†

---

* Pollock, *Expansion of the Common Law*, pp. 63–6.

† *The King* v. *Abbot of Tavistock.* Pl. Ang.-Nor. 69.

Henry I sent itinerants on both fiscal and legal business.* And even in the disturbed reign of Stephen the justices were travelling and hearing pleas of the Crown.†

But it was the reign of Henry II, the great Angevin, that decided the course of English legal development.

In 1176 Henry made six circuits of three judges each, and two years after inquired how the system had worked. He found great dissatisfaction and recalled them. He then made a new departure of immense importance. He appointed five men, two clerics and three laymen (de privata familia sua), who were to hear all the complaints of the people (omnes clamores regni) and do justice; they were not to depart from the King's Court, and questions they could not decide were to be reserved for the king and the wiser men.‡

Next year (1179) he divided England into four parts, and to each part sent "viros sapientes ad faciendam justitiam" § twenty-one in all. It is plain that Henry was making experiments: "now he sends out abbots, now earls, now chaplains, now men of his household, now his most intimate companions to hear and try cases." ‖ From that time the justices have regularly travelled the country. They were, however, inferior in *status* to the permanent tribunal which sat in London,¶ which in turn was subordinate to the "king and his wiser men," *i.e.* the forerunners of Council, and House of Lords.

The General Eyre.—Before dealing with this new Central Court, some account must be given of another institution, the General Eyre. The "itinerants" we have mentioned above

---

* Stubbs, *C. H.*, pp. 391, 443. Henry seems to have been rather active in the administration of justice, for we find in the Anglo-Saxon Chronicles of 1124 the following entry: "In the same year, after St. Andrew's Mass, before Christmas, Ralph Bassett and the king's thegns held a 'Gewitenemote' at Hundehoge in Leicestershire, and there hanged so many thieves as never was before, that was in that little while, altogether four and forty men, and six men were deprived of their eyes and emasculated"; and in the chronicle of 1135: "The king died on the following day after St. Andrew's Mass Day in Normandy. Then there was tribulation soon in the land, for every man that could, forthwith robbed another. A good man he was, and there was great awe of him. No man durst misdo against another in his time. He made peace for man and beast. Whoso bare his burden of gold and silver, no man durst say to him aught but good." (*Sel. Ch.* 98.)

† Mad. Exch. i. 146.

‡ *Gesta Reg. H. II.* (R. S.), i. 207–8.

§ Hoveden, ii. 190 (R. S.)

‖ Rad. de Diceto, i. 434 (R. S.).

¶ Glanv. viii. 5. *Select Pleas of the Crown* (S. S.), pp. xi. *sq.*

acted under their special commission, wide or narrow as the case might be, but every few years the kings sent out justices to hold what were called General Eyres in every county. In the reign of Henry II this occurred every seven years.

The justices overhauled the whole system of administration, they were provided with a set of interrogatories, the Articles of the Eyre, the *Capitula Itineris*, dealing *inter alia* with the extent of the king's demesne lands, robberies, murders, escheats, wardship, marriages, widows, Jews, vacant churches, treasure trove, usury, fugitives, weights and measures, and customs *—all the details of local government for the last seven years. The county and the hundreds were summoned to appear by their representatives, archbishops, bishops, abbots, lords, knights, officials and ex-officials with their writs and documents. Juries of presentment were then chosen, and they were required to answer precisely to the questions, and their answers make up the record, "dicunt," "nesciunt," "sciunt," "malicredunt." The justices had the sheriff's and coroner's Rolls before them, and the various returns were compared and checked. Any omission, any neglect of duty was a ground for amercement, false presentments, foolish presentments (stulta præsentatio), honest mistakes all helped the Treasury. The General Eyre was a great means of raising money, and doubtless stimulated local efficiency, but it was not popular. In 1233 the Cornishmen, at the rumour of its coming, fled to the woods. In 1348 the Commons petitioned against their continuance.† By the end of Edward III's reign they had fallen into abeyance. Parliament provided the needful information, the judges of assize attended to crime, and the misconduct of officials.‡

The Earliest Equity.—The Eyre has, however, in the last few years become very interesting to the lawyer. I quote from Mr. Bolland, a learned editor of the Year Books. "They" (the Justices in Eyre) "did represent the king in a very special and full sense. The king's residual or extraordinary function of causing justice to be done where ordinary means failed, lay in their hands, and they were not only entitled but bound to exercise it. . . . When they arrived at the county town at which they were to hold their Eyre they caused a public proclamation to be made that any one who desired to make complaint, and to have remedy for any wrong of any sort done to him, might present to them a Bill

---

* Stubbs, *Sel. Ch.* 258, 358. † 2 Rot. Parl. 200, No. 4.
‡ 20 Ed. III, c. 6.

stating all the facts, and they promised that justice should be done to him. These bills were presented in very large numbers. . . . The justices inquired into the complaints in a very thorough-going way. They were bound by none of the shackles which bound them when trying a case commenced in the ordinary way by writ. No rules stood in their way to prevent their finding out the exact truth of the matter. They did not concern themselves with finding out what, if any, particular law applied to the matter. They were there to see that right was done, no matter what the law said. They even interrogated the parties, a thing unknown to the common law process. This equitable jurisdiction of the Justices in Eyre is earlier than the equitable jurisdiction exercised by the Chancellor, or even by the King's Council. It is the very beginning of our English Equity, yet all remembrance of it had been lost for nearly six hundred years." * But I will return to this later.

Magna Charta and Henry II.—It is a high testimony to the value of Henry's reforms that in the Great Charter it is enacted—

(1) that the three petty Assizes of *novel disseisin*, *mort d'ancestor*, and *darrein presentment* shall be tried in their proper counties, and that four times a year two justices should be sent down to take them, assisted by four knights chosen by the county, § 18 ;

(2) that no sheriff, constable, coroner, or bailiff shall hold pleas of the Crown, § 24 ;

(3) that common pleas shall not follow the court, but be held in some certain place, § 17.

The establishment of a Central Court, with its itinerant satellites, produced the Common Law. A process of selection and rejection was applied to the local customs, presenting juries were "in mercy" for a "stulta præsentatio," and uniformity emerged, the custom of the King's Court, the Common Law, which Sir Edward Coke said was "the perfection of reason." And that, perhaps, is praise enough.

The Central Court.—We may now look at the Central Court of Henry's invention. It sat term after term, and Glanvill was a member of it. He alludes to it as justices "in banco residentes." It kept only one set of rolls, but some cases are marked "coram rege," probably because the king was there or thereabouts, others as "coram justiciariis de banco." The court took Crown Pleas

* The Year Books, 56.

and Common Pleas indifferently. By the end of Henry's reign it is *capitalis curia regis*. Although it may sit in the Exchequer, and many of its justices were members of the Exchequer, it is not the Exchequer, for it has a seal of its own, and it is not the King's Council, because above it are the "king and the wiser men," the *sapientiores regni*.

The Split.—King Richard spent most of his time abroad, and his reign is unimportant, but John stayed at home and was indefatigable in his "progresses" through the country, and was accompanied by some of the King's Court, while others remained in London. The tribunal, which was undivided before, is now physically divided, and the label "coram rege," which had been attached to the case, is now attached to the court. If the judges with the king heard the case, it was heard "coram rege," while pleas taken at Westminster before the judges who sat there regularly in the sixth, seventh, ninth, and tenth year of John were "coram justitiariis de Banco." Nor do the courts coalesce when the king comes back to town. But each court is *capitalis curia regis*.

The existence of two courts made a further simplification possible. The difference between Crown Pleas and Common Pleas was clear, in the latter both parties were subjects, in the former one was the Crown. Why not allocate the Common Pleas to the stationary court? The Great Charter did this, and touched a real grievance. For if any plaintiff desired the royal justice, he might lay his account for wearisome journeys, following the king in his "progresses," which might take him even into France, carrying his witnesses with him. The Common Pleas, therefore, are no longer to follow the king, but are to be held in "aliquo certo loco," and at Westminster they stayed with a few breaks till the new Courts of Justice were opened at Temple Bar.*

When Henry III began to reign he was an infant, and so no pleas could be held "coram rege," but the "Bench" sat regularly at Westminster for the dispatch of civil and criminal business. There was no royal progress for any pleas to follow.† But when he came of age he made progresses with judges in attendance, and pleas were again heard "coram rege," and then two sets of Plea

---

* Edward III claimed the power to order the court to sit where he pleased. 2 Rot. Parl. 286, No. 4 (38 Ed. III). *Ibid.* 311, No. 7 (49 Ed. III).

† During Henry's minority, the Council had supervision and revision on error of inferior courts (Duffus Hardy, *Description of Close Rolls*, pp. 101–2). and emerged from this reign well organised. But note that in the next reign Council is not distinguishable from Parliament.

Rolls definitely appear, the Coram Rege Rolls, and the De Banco Rolls. There are now *two* courts.

The court, which had acquired a stationary character, naturally became the court which took those pleas which the Charter said should be stationary, and eventually changed its name of Common Bench to that of the Court of Common Pleas.

So when Edward I comes to the throne, we have the Curia Regis, or the court which holds pleas before the king, or the King's Bench as we should call it; we have the Exchequer, which ought to be attending to the fiscal interests of the Crown, but which likes to finger other and more profitable business, and is forbidden to do so by Edward; and we have the Common Pleas, or as it is known at that time, the Common Bench.

CHAPTER VII

THE ENGLISH JUSTINIAN

The reign of Edward I, the great Plantagenet, is a good time to pause and take stock. The reforms of Henry II had borne their fruit in producing a common law, and the Common Law Courts had assumed the form which in effect they retained till 1875. But another movement had begun which presented problems for solution, both constitutional and legal, and the beginning is in this reign.

As we are concerned with judicial development, it must suffice to say that the legislative function passed from the Crown in Council to the Crown in Parliament. But, owing to the fact that in early times they did not distinguish sharply between the redress of a grievance of an individual which is *judicial*, and the redress of a grievance of a considerable section of the public, which is *legislative*, the demarcation of function is not easy. It is useless to demand greater accuracy of treatment than the subject-matter allows, and it is idle to seek in these nascent institutions a specialisation of function to which the period was a stranger.

We have seen that the Curia Regis was in its essence a Feudal Court, strengthened by the official entourage of the king: that this official contingent, being permanent, and occupied in the business of Government, regarded public affairs from an angle which was not the same as that of the territorial magnates. The official section, which we may call "Council," desired a strong central Royal Government, and up to the time of Magna Charta they had succeeded. After the successful national revolt against John, a new assembly appeared containing three elements, the feudal, the official, and the representative. Then the official element was squeezed out and left its appellate functions behind it, the other two remain, and in time are distinguished as

Lords * and Commons, with the Lords as the supreme judicial tribunal.

The royal authority had set the common law on its feet, and the judges are, in cases of difficulty, to consult the king and the wiser men of the realm. The wise men, the grey-beards, have since the dawn of history always been near the throne. But the chronicles sacred and profane witness to this, that it is the king whose duty it is to judge, and not only that, but to do justice in mercy—a very different thing. In the last resort the suppliant for justice may call on the king to help him, for he has extraordinary residual powers, lying in reserve to use for such emergencies. This is proper to his sacrosanct and mysterious office, for it is the most sublime of human functions.

The old Curia Regis threw off a financial department, and then judicial departments, which it supervised, partly through its control of the Writ Office, but kept in its own hands administration, war, policy, and the royal prerogative of doing extraordinary justice—not law but equity, which afterwards developed in the Star Chamber and Chancery. The name Curia Regis acquired a purely judicial association, and the parent body was called the Council, a name it apparently got during the minority of Henry III.

---

* In feudal theory all the king's tenants *in capite* were *pares curiæ regis*, and king's "barones," *i.e.* men. There is general agreement that their number did not fall short of 600, of whom 400 *held single knight's fees*, while 40 had large estates scattered through the country, made up of a varying number, sometimes very large, of knight's fees. It was inevitable that a distinction should be made between the great men who came frequently to court or took the field, with perhaps fifty knights in his train, and the small man who held a knight's fee, who, if he had to come, came alone. The greater men are soon known as "majores barones," though where the line was drawn no one knows; they are twice summoned as such by Henry II, in the course of his dispute with Becket. Magna Charta (§ 14) said that they should be summoned personally to the great taxing councils (sigillatim), while the other tenants *in capite* were to be summoned "in generali" by the sheriffs, while in Henry III's reign a distinction arose in Exchequer practice by which the holders of certain aggregates of knight's fees paid a lump sum into the Exchequer, while the others paid to the sheriff on each knight's fee they held. The former class appropriated the title "baro," and Edward I, recognising the distinction summoned by writ this class, or selected members of it, to sit with his official council, while the minor tenants in chief were no longer summoned *in generali*, but were represented by elected knights of the shire. The barons sat in a separate building, and the baronage became hereditary, for their territorial baronies were not devisable, nor alienable, without royal licence, the "judicium parium" marked them off, and they were recognised as an Estate of the Realm.

Though the Common Law Courts became more defined, the Exchequer less than the other two, yet in this reign the line between the King's Bench and Council is now and again blurred: the Common Law Courts were still subject to interference by Council, and, if we may trust a few cases, were more affected by the equitable practice of the Council than has been generally suspected. We must not allow prepossession to draw clear-cut distinctions, which the circumstances do not permit. It must be remembered that the Common Law judges were members of the Council, and constantly sat with Council and Chancellor, and it is not surprising if they brought into the Common Law Courts some equitable atmosphere.*

Council and Parliament.—In the reign of Edward I a new body appears—Parliament. Meetings of the Great Council of magnates and officials could always be summoned, but in 1265 the representative element appears, and the cities and boroughs are there. Then there comes an experimental period, with meetings of various composition, all considered competent to legislate, and in all of which the official Council is the permanent element.

In 1295 we have what has been called the Model Parliament, the baronage, the clergy, and the commons, *i.e.* the representatives of the shires, cities, and burgesses.

In 1305, two years before Edward's death, a Parliament was held of which we have a clear account, for we have its record in the Rolls Series with an introduction by Maitland.†

This was in the thirty-third year of Edward I, in the month of February. It was a full Parliament: the three estates of the

---

* In the second volume of the Year Books edited by Professor Maitland for the Selden Society (Y. B. 2 and 3 Edw. II), two very interesting cases are given. In one, the defendant being sued on his bond for 100 marks, payable in case of non-delivery of a certain document on a certain day, pleaded that the plaintiff had suffered no damage, and that he had been and still was ready to deliver. The court inquired what equity would it be to give what was really a penalty, when the plaintiff had suffered no damage, and said the plaintiff might wait seven years for his judgment (p. 58). In the other, something very like a "perpetual injunction" is granted against certain persons, restraining them from buying and selling outside the Prior of Coventry's market on market days (p. 74).

Professor Maitland told me shortly before his lamented death that he found two cases of 1310 in which, after quashing a writ, the Chief Justice of the C. B. had to go into Chancery and explain why he did it, and then took part in the formation of a better writ.

† *Memoranda de Parliamento*, 1305.

realm met the King and his Council, in all about six hundred men. There were thirty-three members of the King's Council to whom, *though not prelates or barons*, writs were sent, and others were summoned to advise the king from their special acquaintance with Scotch and Gascon affairs.

This assembly kept together for three weeks, and on the 21st of March proclamation was made that everybody might go home "except the bishops, counts, barons, justices, and others who are of the Council of our Lord the King." The Council, as Maitland says, was the "core and essence" of a Parliament. Those persons still remained who had business to transact, and Parliament remained in session till the 6th of April, on which day the "dominus Rex" was still "in pleno Parliamento." *

The Composition of the Council.—We do not know the exact composition of the council, but we do know that among the thirty-three men, not being earls and barons, who were summoned by name, were the Chancellor of the Exchequer, the Justices of the two Benches, the Barons of the Exchequer, several "itinerants," and thirteen clerks of the Chancery. The Chancery was the Secretariat, and did the king's writing, domestic and foreign.†

These thirty-three men represented the legal, official, and administrative talent of the country. Professor Maitland has compiled a list of names from a comparison of the signatures of those who, before and after the dismissal of the estates, witnessed the king's charters. The names occur of Walter Langton, Bishop of Lichfield and Treasurer; Antony Beck, the great fighting Bishop of Durham; John Halton, Bishop of Carlisle; and the Bishop of Salisbury, the Earls of Lincoln, Gloucester, Hereford, Warwick, and Carrick; Henry Percy, Hugh Despenser, and Robert Clifford; both justices of the forests; John of Brittany and Aymer de Valence, the king's best generals.‡

This meeting of the Council was, at the least, a full meeting

---

* *Memoranda de Parliamento*, p. 293 (Rolls Series).

† Baldwin, *The King's Council*, 316.

‡ Doubtless the king was entitled to call on any of his lieges to give him faithful counsel, a duty, when travelling was difficult, both onerous and inconvenient. As late as 16 Edw. II, Henry de Beaumont, a baron, being summoned to a council and asked his advice, disrespectfully declined to give it. The king angrily ordered him to leave the council. He did so, remarking that he would sooner be out than in. For this refusal and contumely he was committed to prison (Rot. Lit. Claus., 16 Edw. II, m. 5 d. Plac. Abb. p. 342).

of the King's Bench, the Common Bench, the Exchequer, the Chancery, the War Office, and the Wardens of the Marches.

But the political centre of gravity was shifting. Edward I could summon thirty Councillors to a Parliament, Edward III rarely invited more than ten, sometimes only five or less. By the time of Richard II the separation is complete. The memory of this early connexion is kept alive by the writs of attendance sent to the Judges and Law Officers in virtue of which they come and give their advice when asked.

The ultimate Court of Appeal.—In this period of political development where is the ultimate Court of Appeal? Henry III had two courts, each with its own set of Rolls, the Bench with the "de banco" Rolls, and the King's Court with the "coram rege" Rolls.

This last follows the king about, and for ordinary purposes consists of professional justices, but on occasion it could be reinforced by the king's councillors, barons, and earls. This body was superior to "the Bench," for "error" lay to it from "the Bench." But a new set of Rolls begins to appear, not purely for pleas, for we find that petitions and other things are on it. The court which is to be above the King's Bench is being evolved, and its Rolls are the Parliament Rolls. For a time it is hardly distinguishable from the King's Bench. It was really an afforced form of the King's Bench, and this is made certain by our finding that a plea might be adjourned from a Parliament to the King's Bench, or *vice versâ*, without breach of continuity.

Thus two tribunals became three: Bracton knows two.* Fleta knows three: † "justices resident at the bench"; "justices who fill the king's own place"; and another, "habet enim rex curiam suam in consilio suo in parliamentis suis, præsentibus prælatis, comitibus, baronibus, proceribus, et aliis viris peritis ubi terminatæ sunt dubitationes iudiciorum et novis iniuriis emersis nova constituuntur remedia, et unicuique iustitia, prout meruit, retribuetur ibidem."

When the final separation of Council and Parliament came the Parliament Roll, which was once the record of business done by Council, became the record of the Estates of the Realm, and the Appellate jurisdiction remained in the Lords' House of Parliament.

The question had been considered, for in Rot. Par. 50 Ed. III,

---

* F. 108. † P. 66.

No. 48, the unanimous opinion of the judges as to Common Law appeals is entered, that when error occurred in the King's Bench it should be amended *in Parliament*—by the King in Council in Parliament. The argument was that the Council was excluded, for Council was not Parliament; and the Commons were excluded, for they were not Council. This view the Commons accepted in the first year of Henry IV, and the Act of Elizabeth * which established a Court of Exchequer Chamber recites the Lords' jurisdiction on appeal by writ of error. The judges being only members of the Council, and not of the Lords' House, were summoned to hear appeals, but only as "assistants and advisers."

It is convenient to complete the story of the House of Lords.

Chancery Appeals.—The Lords' jurisdiction in Chancery appeals was of slow growth, for equitable jurisdiction itself grew slowly. No instance is known before 1621, when the Lords heard *Sir John Bourchier's case*, and a Committee of Privileges considered that the course then taken was unusual if not incorrect, and that the appeal from the Chancellor lay to the king and his great Council.

After the Restoration, the House of Lords advanced claims to almost unbounded jurisdiction, both appellate and of first instance.

In 1675 their claims to appellate jurisdiction in Chancery proceedings was at first violently resisted by the Commons,† and so intense was the exasperation, that it was not till after two prorogations, one lasting fifteen months, that the Commons desisted from their objection. Since then no question has been raised.

The Lords were not, however, so fortunate in their pretensions to be a court of first instance.

In 1668 occurred the case of *Skinner* v. *The East India Company*. The plaintiff petitioned the king, alleging that as the injury had been committed in Sumatra he could get redress in no other court. The Lords, on a reference from the king, undertook the trial, and gave judgment for the plaintiff for £5,000. The Company then petitioned the Commons, and a violent dispute was the result, which was only composed by the king acting as mediator, and all records of the proceedings were erased from the journals of both Houses. Since then the Lords have never acted as a court of first instance in civil cases. But the House of Lords

---

* 27 Eliz. c. 8.

† *Shirley* v. *Fagg*, *S. T.* vi. 1122–1188.

is the only court that can take cognisance of questions of right in matters of peerage or dignities connected therewith.*

Something may properly be said about the constitution of the House of Lords when sitting as a Court of Appeal.

In the time of Edward III it seems that the jurisdiction was exercised by certain peers nominated by the Crown, assisted by the judges; later the House selected the peers, who followed the advice of the judges. But after the Restoration the peers fell into evil ways, and regardless of law and lawyers, gave judgments as partiality or influence dictated. The last instance of a House made up of non-professional peers sitting for the hearing of appeals occurred in 1834.

In 1844 the *O'Connell case* came up as an appeal by O'Connell against a conviction in the Irish Courts. The case was of great political interest, and large numbers of lay peers attended, prepared to vote, when Lord Wharncliffe, the President of the Council, advised the House not to interfere on questions of law, when the majority of the law lords were in favour of quashing the conviction.

Since then non-professional peers have not voted in appeal cases, the determination being left to the law lords. Even that tribunal was not considered remarkable for strength; indeed, Sir Richard Bethell, the Solicitor-General in 1855, described in the House of Commons the House of Lords as being "inferior to the lowest tribunal in what ought to be the accompaniments of a Court of Justice." †

A perception of this weakness led the Government to attempt the creation of life peers by prerogative: an attempt which failed, but led to the passing of the Appellate Jurisdiction Act of 1876.

Under that statute the final Court of Appeal is composed of professional lawyers, holders and ex-holders of high judicial office. It is bound by its own rulings on questions of law.‡

The criminal jurisdiction of Parliament is mainly of historical interest. But whenever invoked, it inheres in and is exercised by the House of Lords.

That jurisdiction may be exercised on two occasions. A Peer has the right, if indicted for treason or felony, to be tried by his peers; and the House of Commons has the right to impeach any person for any offence, before the House of Lords sitting as judges.

---

* *Cowley* v. *Cowley*, 1901, A. C. 450.

† Hansard, 3rd Series, 2120.

‡ *London Streets Tramways Co.* v. *London County Council*, 1898; A. C. 375.

CHAPTER VIII

THE COURTS OF COMMON LAW

As in the reign of Edward I the administration of the common law took the shape which it kept till the Judicature Act of 1873, it will be convenient briefly to sketch the functions and fortunes of the superior courts.

The Curia Regis now broke up into three bodies. It had been separated into distinct tribunals doing a distinct work for some little time. With the Exchequer attending to the revenue, and the Common Pleas or Common Bench sitting "in a certain place," the process of disintegration had commenced. In Henry III's time a further step had been taken. The great line of Justiciars who presided over the kingdom in the king's absence came to an end, and Robert Bruce was appointed "capitalis iusticiarius ad placita coram rege tenenda" on 8th March, 1268. This marks the divergence between judicial and administrative functions. The head of the law is no longer the Prime Minister.

The King's Bench.—In Edward I's reign the Court of the King's Bench travelled about the country, and the Chief Justice Hengham was stationed from time to time at Winchester, Gloucester, York, and other places. Edward went abroad to Aquitaine, and stayed there over three years, and on returning in 1289 found that his new judges had been misconducting themselves. It was alleged that the Lord Chief Justice had not only taken bribes himself, but had connived at his brother judges doing the same. The king thereupon without inquiry threw them all into prison. The charges having been investigated by a commission appointed by the king, they were all, except two, found guilty, dismissed, and heavily fined, and their successors were required to swear upon entering office "that they would take no bribe, nor money, nor gift of any kind from such persons as had suits depending before them—except a breakfast,* which they might accept provided there was no excess."

* Rapin, iii. 245; and see a similar oath required from the judges (Rot. Claus., 1 Edw. II, m. 19).

The business of the King's Bench was to correct all crimes and misdemeanours that amounted to a breach of the peace, the king being then plaintiff, for such were in derogation of the *iura regalia*; and to take cognisance of everything not parcelled out to the other courts. It also had superintendence of the other courts by way of appeal: thus "error" lay from the Common Pleas to the King's Bench. It could always be directed to accompany the king; the style of the court was "coram ipso rege," and its records were called "Coram Rege rolls." The Chief Justice was assisted by three puisne judges, and they formed the staff of the King's Bench. Its writs were returnable, not at Westminster, like the writs in the Common Bench, but "before the king, wherever he should then be in England."

The period when the King's Bench became free of the obligation to follow the king is suggested by Coke * to be the reign of Edward III. This king is never recorded to have sat personally in court, and it was at the end of his reign or the beginning of the next, *that the King's Bench seems to have disengaged itself as a court from the Council.*†

The Court of Steward and Marshal.—In more intimate relation to the king was the Court of the Steward and Marshal, which had a strictly limited jurisdiction within the "verge," *i.e.* a twelve-mile radius from wherever the king was lodging, and so followed the court. The Steward was the deputy within the verge of the Chief Justice of the King's Bench in his absence, and the Marshal had the custody of the prisoners of the King's Bench. Overshadowed by the Court of King's Bench, and limited in its scope, it did not flourish, and Charles I created a Palace Court, held before the Steward and Marshal, with jurisdiction over all personal actions within twelve miles of Whitehall. This court, however, enjoyed little reputation and died an ignominious death in 1849.‡

---

* 10 Co. Rep. 73, b.

† No separate records of Council proceedings are known before 1386. Before that date Council proceedings are often entered on the K. B. rolls. (Pike, *History of the House of Lords*, p. 46.)

‡ Cf. Thackeray's Ballad of Jacob Omnium's Horse *ex relatione*. Policeman X.—

> "The Judge of this year Court
> Is a mellitary beak
> He knows no more of Lor
> than praps he does of Greek
> and prowides himself a deputy
> because he cannot speak."

The Common Pleas.—The Court of Common Bench or Common Pleas decided controversies between subject and subject, and its records were called the "De Banco Rolls."

The Exchequer.—The Exchequer as a departmental office had a separate existence as early as Henry II. In time it became a revenue department, and a court of justice. Its proper business, the due collection of king's debts, necessarily involved the determination of legal questions, in which the king was plaintiff in respect of his *iura fiscalia*, while its intimate connexion with King and Council as an executive department explains why it did not administer the pure common law, but a mixture of common law and equity which was known as the "course of the Exchequer." The character of the Exchequer work, which was essentially administrative, for long prevented the court from ranking as a law court with the King's Bench and the Common Bench. The Chief Baron was as a rule a lawyer, and indeed in the reign of Henry IV, Henry V, Henry VI, and Henry VII was also Chief Justice of the Common Pleas: but the other barons were revenue officials, treasury men, and unlike the justices were not summoned to Parliament.

Unlike the judges of the two Benches, their appointment was "quamdiu se bene gesserint," they never went circuit till Elizabeth, in 1579, gave the Barons patents of precedence; they were then recruited from the Bar, and it became the duty of the Cursitor Baron to attend to the fiscal side. The Barons were thus placed on an equality with the other judges.*

In time the Exchequer developed, in addition to its purely revenue side, a common law side and an equity side. The Common Law Court was held before the Treasurer and the barons, and sat for the benefit of the king's debtors, and here the proceedings on the writ of *Quominus* were heard. In this court the king could call for payment from his debtor's debtor, and from the debtor of that debtor, and so on indefinitely.

The equity side, formed by the Treasurer, the Chancellor of the Exchequer, and the barons, called the king's debtors to account by a bill filed by the Attorney-General, and used the subpœna. The "course of the Exchequer" involved both legal and equitable procedure, and naturally the usurped jurisdiction divided itself on these lines. "Any person," says Blackstone, "may file a bill against another on the bare suggestion that he is the king's

* Foss. *Judges*, v. 409–10.

accomptant, but whether he is so or not, is never controverted." The equitable jurisdiction was taken away in 1842, when two new Vice-Chancellors were appointed to do the work so liberated. This did not, however, affect the jurisdiction of the Exchequer in revenue cases, where law and equity had always been concurrently administered.*

The King's Bench and Exchequer had properly no jurisdiction over purely civil cases, which were the province of the Common Pleas. But when these two courts became stationary in London, they commenced to poach on this well-stocked preserve—"boni iudicis est ampliare iurisdictionem," and virtue was suitably rewarded by court fees.

The Exchequer and "Quominus."—The Exchequer employed the writ of *Quominus*, in which the plaintiff, who desired his case tried in the Exchequer, suggested that he was the king's debtor, and that the defendant had done him an injury, whereby he was the less able "quominus sufficiens existit" to pay the king his debt. The allegation of a king's debt was a mere fiction, but it was not allowed to be contradicted; and it was held that this circumstance made the action a revenue matter, properly cognisable in the Exchequer. This writ was a *capias*, and on it the defendant could be arrested and brought into the Exchequer.†

The King's Bench and "Latitat."—The King's Bench employed the writ of *Latitat*. The Court of King's Bench had an original jurisdiction in trespasses "vi et armis," committed in Middlesex or in whatever county the court happened to sit, such trespasses being considered to be of a criminal nature and to

---

* *A.-G.* v. *Halling*, 15 M. & W. 687.

† "George II, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, and so forth, to the Sheriff of Berkshire greeting. We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford of the county of Oxford, gentleman, wheresoever he shall be found in your bailiwick, and him safely keep so that you may have his body before the barons of our Exchequer at Westminster on the morrow as hereby directed, to answer William Burton our debtor of a plea that he render to him £200 which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith he can reasonably show that the same he ought to render: and have you there this writ. Witness, Sir Thomas Parker, Knight, at Westminster, the sixth day of May in the twenty-eighth year of our reign."

The sheriff's return: "By virtue of this writ to me directed I have taken the body of the within named Charles Long, which I have ready before the barons within written, according as within it is commanded me."

demand a speedy remedy. The plaintiff therefore, who desired to bring a civil action, say for debt, in the King's Bench, took out a bill of Middlesex (so called because the court normally sat in that county), alleging in it trespass "vi et armis." In it, the sheriff of Middlesex was directed to take the defendant and to have him before our lord the king at Westminster to answer.

If the defendant lived in Middlesex, the sheriff produced him in court: were the defendant living in Berkshire, the sheriff made the return "Non est inventus," and then issued the writ of *Latitat* addressed to the sheriff of Berkshire, reciting the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant "latitat et discurrit" in Berkshire, and commanding the sheriff to have his body in court on the day of the return. Eventually when the defendant lived out of Middlesex, the bill of Middlesex and the sheriff's return were taken for granted, and the action began with the *Latitat*.

Once the defendant was in the custody of the Marshal he was considered to be before the court for all purposes, and could be proceeded against by bill for the debt, without taking out an original writ, as was the proper course on such a cause of action.

In the time of Henry VI it was considered enough that the defendant should appear or give bail, and actual custody was not required; and ultimately it was held that a record on the court roll that the defendant had given bail was evidence enough of custody.

If the defendant did not appear, the plaintiff was permitted to enter an appearance for him, and to give bail for him with sureties, John Doe and Richard Roe. This was duly recorded, and was sufficient evidence of custody to give the court jurisdiction. This performance was known as giving "common bail." If, however, it was desired that the bail should be not fictitious but substantial, the defendant was required to put in "special bail," and in default was kept under arrest. This opened the door for abuse of process, and many complaints arose that persons were arrested on these Bills and Latitats,* which did not express any particular cause of

---

* "Middlesex to wit: The sheriff is commanded that he take Charles Long, late of Burford in the county of Oxford, if he may be found in his bailiwick, and him safely keep so that he may have his body before the lord the king at Westminster on Wednesday next after fifteen days of Easter to answer William Burton, gentleman, of a plea of trespass (*and also* to a bill of the said William against the aforesaid Charles for £200 of debt, according to

action, and although there was little or no such cause, were kept long in prison for want of bail, bonds with sureties having been demanded in such great sums that few dared to be security to the amount. Accordingly the Statute 13 Car. II, st. 2, c. 2, provided that the true cause of action should be expressed in the writ, else the person arrested should be bailed and no security for appearance should be taken in a greater sum than £40. To meet this difficulty the King's Bench added an "*ac etiam*" clause to the usual complaint; thus if the plaintiff wished to sue the defendant for debt he alleged first of all the trespass "vi et armis," and then added the "*ac etiam*" clause, in which the debt was mentioned as though it was subsidiary to the fictitious claim.

This invention was an immense success. The process was far cheaper and the Common Pleas lost almost all its work. Its judges were enraged and spoke with great freedom, but to no purpose, "the losers might speak, they got nothing else, and the *triccum in lege* carried it for the King's Bench; which court ran away with all the business." *

The Common Pleas got some of their own back, when North, C.J.,† copied the King's Bench by also issuing a *capias*

---

the justice of the said court of the said lord the king, before the king himself to be exhibited), and that he have there then this precept."

The sheriff's return: "The within named Charles Long is not found within my bailiwick."

"George II, by the grace of God, the Lord of Britain, France, and Ireland, the King, Defender of the Faith, and so forth, to the Sheriff of Berkshire greeting. Whereas we lately commanded our sheriff of Middlesex that he should take Charles Long, late of Burford in the county of Oxfordshire, if he might be found in his bailiwick, and him safely keep so that he might be before us at Westminster, at a certain day now passed, to answer unto William Burton, gentleman, of a plea of trespass (and also to a bill of the said William against the aforesaid Charles for £200 of debt, according to the custom of our court, before us to be exhibited), and our said sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick, whereupon on behalf of the aforesaid William in our court before us, it is sufficiently attested that the aforesaid Charles lurks and runs about in your county, therefore we command you that you take him, if he may be found in your bailiwick, and him safely keep so that you may have his body before us at Westminster on Tuesday next after five weeks of Easter, to answer to the aforesaid William of the plea (and bill) aforesaid and have you there then this writ. Witness," etc.

The sheriff's return: "By virtue of this writ to me directed I have taken the body of the within named Charles Long which I have ready at the day and place within contained according as by this writ it is commanded me."

* *Lives of the Norths*, i. 129.

† This was Francis North who, as Lord Guilford, preceded Jeffreys as holder of the Great Seal, and whom Jeffreys took every opportunity of humili-

"quare clausum fregit," and tacking on to this fictitious trespass an *ac etiam* clause which disclosed the true cause of action. The defendant was arrested on the *capias*.

These fictitious methods lasted till 1832, when the Uniformity of Process Act (2 Will. IV, c. 39) swept them all away, confirmed the co-ordinate jurisdiction, and directed that all actions should be commenced by a writ as prescribed in the Act.

The King's Bench: its supervisory powers and methods.—The King's Bench presided over the administration of the criminal law. There was and is no offence not triable there. It superintended the other tribunals, employing the writs of *mandamus*, *prohibition*, *certiorari*, and *error*.

The writs of *Mandamus* * and *Prohibition* issued, and issue still, when either justice is delayed by an inferior court that has proper cognisance, or such inferior court takes upon itself to examine a cause and decide the merits without legal authority. In the first case a writ of **Mandamus** is issued. This is a prerogative writ flowing from the king himself, sitting in the Court of the King's Bench, superintending the police, and preserving the peace of the country.† It issued from the King's Bench, and was a command directing any person, corporation, or inferior court of judicature in the king's dominions to do *some particular thing* therein specified appertaining to its office or duty, which the Court of King's Bench supposed to be consonant to right and justice, where the performance of the duty sought to be enforced could not be compelled by action. An order *nisi* issued in order to give the other side an opportunity of showing cause why a mandamus should not issue. There was a similar writ "procedendo ad iudicium," which issued from Chancery, for delay in giving judgment returnable in the King's Bench or the Common Pleas. It did not direct any particular judgment to be given, for

---

ating, as when he circulated the tale that the Lord Keeper had been to the Zoo, and had taken a ride on the rhinoceros, at which the Lord Keeper was much "roiled." (*Lives of the Norths*, ii. 167.)

* "Edward, by the grace of God, &c. to . . . of . . . greeting. Whereas by . . . [*recite Act of Parliament, &c.*] and whereas we have been given to understand, and are informed in the King's Bench Division of the High Court of Justice before us that . . . [*insert averments*] and you the said . . . were then and there required by . . . [*insert demands*] but that you the said . . . well knowing the premises, but not regarding your duty in that behalf, neglected and refused to . . . &c., we . . . do command you . . . firmly enjoining you that you," &c.

† Per Lord Mansfield, *R.* v. *Barker*, 1 W. Bl. 352.

an erroneous judgment may be set aside on appeal, but *some* judgment must be given without further hesitation. Disobedience was punished by attachment, and committal for contempt.

A "prerogative" writ is one which does not issue like others of strict right, but at the discretion of the sovereign acting through that court in which he is supposed to be present, and only issues from the King's Bench Division.*

The Writ of Prohibition.—In the second case the writ of Prohibition was employed. This was a prerogative writ which issued out of the King's Bench properly, but also for the furtherance of justice in some cases out of Chancery, Common Pleas or Exchequer, being returnable only in the King's Bench or Common Pleas (now the King's Bench Division), and was directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, on the suggestion that either the cause originally or some collateral matter arising therein did not belong to that jurisdiction, but to the cognisance of some other court.

Since the Judicature Acts an appeal lies from every order of the High Court of Justice to the Court of Appeal, and thence to the House of Lords, but till then the only method of questioning the propriety of a prohibition was by the issue of a writ of Consultation under the Statutum de Consultatione 24 Ed. I, for it was held that in such a case a writ of error did not lie either to the Exchequer Chamber † or to the House of Lords.‡

If the judge to whom the prohibition went thought it ill founded, he consulted with the king's justices, and if it appeared to the court that it ought not to have issued, a "consultation" was awarded, signifying to the inferior court that it might lawfully proceed.§

Thus careful has the law been in compelling the inferior courts to do ample and speedy justice: in preventing them from

---

* Per Manisty, J., *R.* v. *Lambourne, etc. Ry. Co.*, 22 Q. B. D. 469.

† *Free* v. *Burgoyne*, 5 B. & C. 765.

‡ *Bishop of St. David* v. *Lucy*, 1 Lord Raym. 539.

§ "Rex, &c. iudicibus ecclesiasticis salutem. Prohibeo vobis ne teneatis placitum in curia christianitatis quod est inter M. et R. de laico feodo predicti R. unde ipse queritur quod M. eum trahit in placitum in curia christianitatis coram vobis, quia placitum illud spectat ad coronam et dignitatem meam."

"Dilecto in Christo tali. Inspectis litteris vestris, quas nobis transmisistis et plenius intellectis (sine præiudicio melioris sententiæ) consultationi vestræ

transgressing their due bounds, and in allowing them the undisturbed cognisance of such causes as by right founded on the usage of the Kingdom or an Act of Parliament to properly belong to their jurisdiction.*

Writ of Certiorari.—The writ of *Certiorari* issues to judges or officers of inferior jurisdictions from the King's Bench (now † the King's Bench Division of the High Court), to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the court below. It also issues from the House of Lords, on motion there, for removing thither an indictment for felony found by a grand jury against a Peer.‡ It can also be used for removing indictments found at Quarter Sessions in London, Westminster, Southwark, Middlesex, Essex, Kent, and Surrey, into the Central Criminal Court, and for removing indictments from any Court of Session Assize (including the Central Criminal Court), Oyer and Terminer, a gaol delivery, or any other court, into the King's Bench Division on the Crown side. The Crown can demand this writ of absolute right, the subject obtains it at the discretion of the court. The grounds on which it is granted are that a fair and impartial trial cannot be had in the court below, that

---

duximus respondendum, quod si res ita se habet sicut in consultatione vestra exposuistis videtur nobis quod in causa ista bene potestis procedere non obstante regia prohibitione."

If the judges did not obey they were summoned to the King's Court to answer.

"Rex vicecomiti salutem. Prohibe iudicibus—ne teneant placitum. . . . Et summone per bonos summonitores ipsos iudices quod sint coram me vel iustitiis meis ostensuri quare placitum illud tenuerunt," &c. (Glanv. lib. 4, cc. 13–14.)

The modern form is as follows:

"George, by the grace of God, &c. to [*the keepers of Our peace and Our justices assigned to hear and determine divers crimes, trespasses, and other offences committed within Our County of . . .*] greeting.

"Whereas We have been given to understand that you the said [*justices have entered an appeal by A. B. against, &c.*]. And that the said . . . has no jurisdiction to hear and determine the said . . . by reason that [*here state fact showing want of jurisdiction*].

"We therefore hereby prohibit you from further proceeding in the said . . .

"Witness," &c.

* Bl. *Comm.* iii. 114.

† Judicature Act, 1873, § 34.

‡ Trial of Earl Russell. Before the King in Parliament, 1901, A. C. 446.

questions of law of unusual difficulty may arise, or that a special jury may be required for a satisfactory trial.*

The Writ of Error.—The "writ of error" issued either on the suggestion of some fact which affected the validity of the action, as, for instance, that the unsuccessful party was an infant and appeared by attorney, or on some error *in point of law*, apparent on the face of the proceedings; or in other words, error on the record.

The King's Bench had jurisdiction to amend the errors of inferior courts—including until 1830 the Common Pleas. Its own error till 1585 could only be amended in Parliament.

The Court of Exchequer Chamber.†—The Exchequer was, as we have seen, originally a finance department, and in virtue of this character declined in 2 Edw. III to send their record to the King's Bench, on the ground that the Exchequer had always amended its own error. This position they maintained, but by 31 Edw. III, st. 1, c. 12, the Chancellor and Treasurer were directed on complaint of error in the Exchequer—taking to them the justices and other sage persons—to call before them the Barons of the Exchequer and amend the error, if any. The Chancellor and Treasurer were the tribunal, the others merely assistants. In 1668 an Act was passed enabling the Chancellor or Lord Keeper to give judgment alone.‡

---

* "George, by the grace of God, &c. to Our justices of Oyer and Terminer in and for Our County of Oxford, and to every of them greeting: We being willing for certain reasons that all and singular indictments of whatsoever felonies [*or* misdemeanours] whereof *A. B.* is or may be before you indicted (as is said) be determined before us in the King's Bench Division of our High Court of Justice, and not elsewhere, do command you, and every of you, that you or any of you do forthwith send under your seals, or the seal of one of you, before us in Our said Court at the Royal Courts of Justice, London, all and singular the said indictments, with all things touching the same by whatsoever name the said *A. B.* may be called therein, together with this Our Writ, that We may cause further to be done thereon what of right and according to the law and custom of England We shall see fit to be done.

"Witness," &c.

† The name "Court of Exchequer Chamber" seemingly arose (like the "Court of Star Chamber") from the room in the Exchequer where the judges used to meet informally to discuss difficulties. It was applied to *three different statutory courts*.

‡ This explains how Lord Keeper Somers in the *Barkers' case* was able to reverse the judgment of the Exchequer, contrary to the view of the majority of the judges.

This may be called the *first* Court of Exchequer Chamber (Cam. Scacc.), and dealt with error in the Exchequer.

The *second* Court of Exchequer Chamber was quite different. This was set up to deal with error in the King's Bench. It was only in Parliament that the King's Bench could be corrected, and Parliaments were infrequent. So in 1585 (27 Eliz. c. 8, amended by 31 Eliz. c. 1) a new court was established consisting of the judges of the Common Pleas and Barons of the Exchequer, or any six of them, to review certain judgments of the King's Bench. Cases where the Crown was a party were excluded. From this court appeal lay to Parliament. In the excluded cases the appeal, as before, went direct to Parliament.

The *third* and final Court of Exchequer Chamber was set up in 1830,* and took appeals in error from *all three Common Law Courts*. The court was to be made up of the judges of the two courts other than the one appealed against.

From this court appeal lay to the House of Lords, representing the old Curia Regis.

The Common Law Procedure Act, 1852, abolished the writ of error in actions in the Superior Courts and a "memorandum in error" was substituted; that again was abolished by the rules under the Judicature Acts,† and an appeal in the full sense provided instead.

Writ of Error in Criminal Cases.—The writ of error in criminal cases‡ lasted till 1907, when it was abolished by the Criminal Appeal Act.§ It was an appeal of a limited character, and went to the Court of Appeal and thence to the House of Lords, as in the case of *Castro* v. *The Queen*.‖

The Courts of Assize and "Nisi Prius."—At the present day the judge who goes on circuit sits under three commissions: (1) the Commission of General Gaol Delivery, in virtue of which he clears the gaol of all persons awaiting trial; (2) the Commission of Oyer and Terminer, in virtue of which he tries those criminal cases in which the grand jury have found a true bill; (3) the Commission of Assize, which is a survival of the old commission empowering the judge to try the Possessory Assizes. As the Commissioners of Assize were usually Royal judges, other commissions

---

* 11 Geo. IV; 1 Will. IV, c. 70.

† O. 58.

‡ For the history of the writ of error in criminal cases, see Lord Mansfield's judgment in *Wilkes' case* (4 Burr. 2550).

§ 7 Edw. VII, c. 23, *infra*, p. 188.

‖ 6 Ap. Cas. 229.

were gradually given to them. To the Commission of Assize, the Stat. West. 2, c. 30, annexed the power to hear other cases "at *Nisi Prius*." Before the *Nisi Prius* writ was invented, if the plaintiff had an action in Oxfordshire, he had to come up to London to try it, and bring his witnesses, the sheriff of the county being directed by a writ of *venire facias* to bring up an Oxfordshire jury; after the Statute empowered the judges of Assize to try other issues in the counties, the writ was altered, and the sheriff was directed to bring up the twelve lawful men from Oxford to try the Oxfordshire case in London, *unless before the date specified the justices of the king had come into that county*, "nisi prius ad partes illas venerint," in which case the justices tried the cause in Oxford, and spared everybody the trouble of coming to London.*

By the 27 Edw. I, c. 3, the justices of Assize were made commissioners of gaol delivery. By the 2 Edw. III, c. 2, they were made commissioners of oyer and terminer. Since the Judicature Act of 1873 the judge acting under these commissions is "a court of the High Court of Justice," † which means that he is not limited by the terms of his commissions, but that he can do anything that a judge sitting in the Royal Courts of Justice can do.‡

---

* The amended form of the writ was: "Præcipimus tibi quôd venire facias coram iusticiariis nostris apud Westmonasterium in Octabis Sancti Michaelis, nisi talis et talis tali die et loco ad partes illas venerint, duodecim legales homines," &c., in which case it was his duty to return the jury, before the judge of Assize. (13 Edw. I, c. 30, § 1.)

† 36 & 37 Vict. c. 66, § 29.

‡ It had been suggested that before the Act a mandamus could issue to him if he refused to perform an obligatory duty. (*R.* v. *Harland*, 8 A. & E. 826. See, however, the judgment of Willes, J., in *Ex parte Fernandez*, 10 C. B. N. S. at p. 49.)

CHAPTER IX

THE HIGH COURT OF PARLIAMENT

The original criminal jurisdiction of Parliament is exercised on two occasions, and then by the House of Lords.

(i) A peer if indicted for treason or felony *must* be tried by his peers.

(ii) The House of Commons has the right to impeach any person for any offence before the House of Lords.

(i) *The Privilege of the Peerage.*

This is derived from the thirty-ninth clause in the Great Charter, in which the words "judicium parium" occur. All the king's tenants *in capite*, whether they held one knight's fee, or fifty, were "pares" in the Curia Regis, and that was their proper court as a matter of tenure. When the "majores barones" were marked off politically as a separate class, and appropriated the name of baron, their "equals" were the other persons of the same status, and in matters of life and death the baron considered himself entitled to be tried by barons, and not by some ordinary king's judge, in the King's Court with the king as prosecutor. The lesser "barones," who lose this title and are merely knights, for a time make good their old feudal position, and a knight could and did object successfully, if he were not given a jury of knights.*

Common people were tried by other common people, and as this class was the most numerous, the error arose that "judicium parium" meant trial by jury. This was not happy, for at the

* Mr. Bolland was, I think, the first to discover this case of 1302 Y. B., 30, 31 Edw. I, 531 (K.S.). Littleton says that there is no legal difference between tenure by barony and tenure by knight-service, and it is doubtless due to this very ancient link, that down to 24 Geo. II, c. 18, it was necessary for knights to be on an "Assize" to which a peer was a party.

date of the charter, trial by jury was unknown. The privilege covers treasons and felonies, but not misdemeanours. Treasons and felonies were capital offences, and involved forfeiture and escheat, and it was perhaps not unnatural that these great men should desire to be tried by their equals rather than by royal judges who, apart from their office, were of little account, and possibly amenable to royal influence.

Misdemeanours in those days were trifling affairs and were visited by amercements, so that it is interesting to note that in spite of § 21, which provided that earls and barons were not to be amerced, "nisi per pares suos," misdemeanours were not included in the privilege. A peer who commits a misdemeanour (some of which are punished as severely as felonies) is tried in the ordinary way, like any ordinary mortal.

A peer cannot waive the "privilege." * It is indeed doubtful whether it is correct to use the word "privilege" in this connexion, and whether the question is not really one of jurisdiction.

The privilege depends on nobility of blood rather than to a seat in the Lords, and has been enjoyed by lords under age, and by the Popish lords who were at the time incapable of sitting there.

Peeresses by birth or marriage are tried like peers, "but if she be noble by marriage, and marry under the degree of nobility, she loseth her dignity, for as by marriage it was gained so by marriage it is lost." †

If Parliament is sitting the peer is tried by the whole of the Temporal Peers, the Lord High Steward appointed *ad hoc* under the Great Seal presiding. Each peer is a judge of law and fact, and addresses his brother peers. This is called a trial before the king in Parliament, and carries us back to the Norman Curia Regis.

If Parliament is not sitting, the peer is tried in the Court of the Lord High Steward appointed in the same way, and here the Lord High Steward is sole judge on matters of law and practice. This court dates from the first year of Henry IV. Only those lords attended who were specially summoned by precept, so that down to the reign of William III the presiding judge could pack the court.

---

* *Lord Graves' case*, Hansard, 3rd Series, vol. 310, p. 246. And see the opinion of the judges in *Lord Audley's case*, 3 S. T. 402. For the procedure, see *Earl Russell's case*, 1901, A. C. 446.

† Coke, *Inst.* pt. ii. c. 29.

Partial Assimilation of the Two Courts.—By 7 Will. III, c. 3, the jurisdiction in cases of *treason* was conferred on the whole body of the peers entitled to sit and vote, *whether Parliament was in session or not.* This Act was not, however, to apply to impeachments, nor to trials for counterfeiting the coin, the Seals, the Sign Manual, or the Privy Signet. The privilege has been extended in some particulars and confirmed by more recent statutes.* It is the statutory duty of the Lord High Steward to summon all peers who are entitled to sit and vote twenty days before the trial. He is the sole judge and decides all matters of law ; the peers attending act as a jury, and are called the Lords Triers. The verdict is that of the majority, and to procure a conviction there must be twelve who find the accused guilty. The proceedings are on indictment found in the ordinary course and removed by *certiorari.*

If we except the treasons to which the statute of William applies, it seems that if Parliament were not in session, a peer could be tried by the Court of the Lord High Steward made up of a limited number of peers.

The Position of the Spiritual Lords, and its Explanation.—In a trial before the king in Parliament the spiritual Lords can attend up to judgment, but they have never been summoned to the Court of the Lord High Steward. The reasons are historical.

The clergy always contended that they were not amenable to the ordinary courts of law, and that they were only bound to answer in their own ecclesiastical tribunals, and for a long time they made their contention good, although it is doubtful whether high treason was ever covered by " benefit of clergy " : it certainly was not at a later date.† Consistently with this view a bishop if arraigned for treason never pleaded his peerage but pleaded his clergy. The churchman claimed entire exemption from all secular jurisdiction whatever, and nothing less.

The Bishop of Hereford, in the seventeenth year of Edward II (1324), when arraigned in the King's Bench for treason, pleaded his " clergy," which was allowed by Parliament on the point being referred.

The Bishop of Carlisle, who was implicated in the Earl of Huntingdon's treason, was in 1401 indicted in the King's Bench ; he pleaded under protest of his ecclesiastical privileges, and put

---

* 2 & 3 Anne, c. 20 ; 6 Anne, c. 23 ; 6 Geo. IV, c. 66 ; 25 & 26 Vict. c. 65.

† 2 *Inst.* 634.

himself on the jury and was convicted : but he never pleaded his peerage.

The bishops had struggled to get rid of secular jurisdiction and with this result. They had always rejected the right, which perhaps as holders in barony they may have had, of being tried by peers on an indictment. As the Church could not consent to a judgment of blood, they were useless as judges in cases of treason and felony. When the Court of the Lord High Steward was instituted, the claim of the spiritual Lords to be Peers of the Realm was practically extinguished. They never received a summons from the Lord High Steward, for they could not pass sentence. In trials in the House of Lords they were occasionally represented by a lay peer as their proxy, which Littleton considered right and proper ; but whatever the difficulty was, no Proctor was ever nominated for the Court of the Lord High Steward.

In the reign of Henry VII they were known as " Lords of Parliament " and not as " Peers of the Realm " ; and when the monasteries were dissolved by Henry VIII and the Abbots disappeared, only a beggarly remnant of bishops survived, without numbers and without influence.

Cranmer when indicted in 1553 put himself on a jury of Middlesex, then withdrew his plea and pleaded guilty and never raised the question. Since that trial it has never been suggested that bishops enjoy a trial by Peers of the Realm.

(ii) *The Commons' Right of Impeachment.*

Criminal proceedings by way of impeachment are taken in the High Court of Parliament before the Lords as judges, the Commons being then prosecutors, and appearing by managers appointed for the occasion, who exhibit articles of impeachment. The Lords vote individually and the majority prevails.

Procedure irregular.—Before the reign of Henry IV the practice when a peer was accused was extremely irregular and unsettled. Bracton apparently only knows of " appeal " as the method of accusation in such a case. Gaveston was not tried at all, but beheaded by four earls acting under an Article of the Lords Ordainers, which provided that he should be treated as a public enemy if he returned from banishment. The Earl of Carlisle, in the same reign, was degraded from his peerage by a Commission, on the ground that his misdeeds were notorious and

that "our Lord the King records the fact." He was then sentenced.

In 1304 Nicholas de Segrave was accused in Parliament by the king and pleaded "guilty," and the king then consulted the comites, barones, magnates, and others of the Council as to the punishment, but in the end pardoned him.*

In the reign of Edward III procedure was still uncertain. In the fourth year of the king, the peers, at the special request of the king, heard the case of Simon de Bereford accused of treason, and gave judgment, but protested that they were not bound to try *other persons than peers.*†

In the same year, Sir Thomas Berkeley, being brought before the king "in full Parliament" and charged with the murder of Edward II, said that he was then lying ill in another place and put himself "de bono et malo super patriam." And the jury came "coram domino rege in parliamento suo" and found in favour of the "alibi": "ideo idem Thomas inde quietus" (1330 A.D.).‡

In 1376 (50 Edw. III) the case of Lords Latimer and Neville and certain commoners occurred, and it is frequently referred to as the first instance of a genuine impeachment in our sense. The Commons petitioned that the articles of impeachment should be heard by a commission of judges and other lords in London and other suitable towns, to which the king assented.§

The Lords no longer object to try Commoners.—In 1387 we find that the Lords have abandoned the view that they are not bound to try commoners, for in an appeal of treason against the Archbishop of York and certain peers and commoners they claimed the right to judge peers *with others* in crimes against the State, and did so. This is worthy of attention, as showing that the doctrine that commoners could be impeached only for misdemeanours had not yet appeared.

Ten years later (1397) the Commons claimed the right to impeach any person when they pleased in Parliament, and recorded their claim on the Parliament roll. The king assented, and on the same day they impeached the Archbishop of Canterbury. The king took time to consider, on the ground that *the Archbishop* was *a peer of the realm.* The archbishop made a confession, which was adjudged in Parliament by the King, the Temporal Lords,

---

* Rot. Parl. 172. † 2 Rot. Parl. 53. ‡ *Ibid.* 57.
§ *Ibid.* 323–6, 329, 385.

and Thomas de Percy, *as proctor for the prelates and clergy*,* to be a confession of treason. Sentence of banishment accordingly.

Impeachments of Commoners.—With respect to impeachments against commoners it has been pointed out that the Lords at an earlier period were not always consistent in the view they took, and Blackstone † laid it down that a commoner could not be impeached but for a misdemeanour. This position, which cannot be maintained now, was possibly, as Mr. Pike suggests, due to the fact that between 1449 and 1621 there were no impeachments at all, proceedings being taken by a Bill of Attainder, which was usually introduced in the Lords, and this perhaps may have obscured the right of the Commons to impeach a commoner.

In *FitzHarris's case* ‡ the impeachment was for high treason. The Lords refused to try him, and voted that the proceedings should be at common law. The Commons thereupon resolved that it was their undoubted right to impeach any peer or commoner for treason or any other crime or misdemeanour. Parliament was speedily dissolved, and FitzHarris was tried and convicted by a jury. This case was perhaps prejudiced by the fact that the Lords knew that FitzHarris had already been arrested and was waiting his trial in the ordinary course, and that if a bill had not been already found against him it speedily would be.

In 1689, in the case of *Sir Adam Blair* and four other commoners impeached for high treason, the Lords searched for precedents and resolved that the impeachment should proceed.

Law as to Impeachments generally.—It remains to say that it was settled in *Lord Danby's case* (1678) (1) that a pardon by the Crown could not be pleaded in bar to an impeachment, a rule made statutory by the Act of Settlement; and (2) that the bishops, though they could in a capital case be present and vote on all preliminary questions, should not vote on the final question of guilty or not guilty. By ancient custom the bishops never voted on a judgment of blood, and they were expressly excused by the Constitutions of Clarendon.

> "Episcopi sicut cæteri barones debent interesse iudiciis cum baronibus quousque perveniatur ad diminutionem membrorum vel ad mortem."

---

* This procuration or proxy was resorted to in consequence of the Commons complaining that judgments and ordinances had been in the past annulled on the ground that the clergy had not on the particular occasion been represented.

† *Comm.* iv. 256.

‡ 8 *S. T.* 236.

It is almost certain that neither prorogation nor dissolution stops an impeachment. The doubts which were felt produced, on the occasion of the trials of Warren Hastings and Lord Melville, special Acts of Parliament to that effect.*

In Richard III's reign it was not unusual for persons not members of Parliament to bring private accusations of crime ("appeals") in Parliament, on which proceedings were taken either in the Lords or in the ordinary courts.† This practice culminated in a series of appeals and counter-appeals brought by the ministers of Richard II against each other in Parliament for high treason, as each got the upper hand. In consequence the statute 1 Hen. IV, c. 14, was passed directing that henceforth no appeal should be pursued in Parliament: the only process left for the judgment of a peer by peers was by impeachment or indictment. That is so to-day.

The statute, however, did not prevent a commoner "appealing" a peer. In such case, the appellee was not tried before his peers, but like any common person.‡

Bills of Attainder and of Pains and Penalties.—In early times, the distinction that we draw between a judicial and a legislative Act was not clearly recognised. The Bill of Attainder, and the Bill of Pains and Penalties were nothing more, when passed, than Acts of Parliament for killing or otherwise punishing a man without trial. The great advantage of proceeding by Bill of Attainder was that thus it was possible to get rid of the difficulty, sometimes insuperable, as in Strafford's case, of proving that the person whose death was desired had committed any legal offence which would support the capital charge.

---

* 26 Geo. III, c. 96, and 45 Geo. III, c. 125.
† Steph. *H. C. L.* i. 151 *sq.*
‡ Y. B. Easter, 1 Edw. IV, No. 17, fo. 6.

CHAPTER X

THE KING'S COUNCIL

It is only with the judicial functions of this great court that we are now concerned, and of these some account must be given; and it may be convenient to say that the view which will be presented in the following pages is that up to the time of the Tudor monarchs, what is so familiar to students of Sir H. Maine's works as "the residuary royal justice," both civil and criminal, was administered by the Council or the King in Council, and that although a line of cleavage is becoming visible, yet that no actual and permanent cleft occurred between the civil and criminal work till the time of the Tudors, when the criminal side became the province of that committee of the Council which is known to us as the Court of Star Chamber, and the civil side partly became the peculiar and separate jurisdiction of the Chancellor and partly was exercised by the Court of Requests.

This central body, Curia Regis or Great Council, having thrown off the Exchequer and Law Courts, still, as we have seen, retained a supervision of the law. The foundation of the Common Law was the Writ Process, and the writs were sealed by the Chancellor, who was not only the first of the royal chaplains, but "secretary of state for all departments," and did all the king's writing. He had a staff of clerks who sat behind a lattice (cancelli) as they do in the post-office to-day, and handed out appropriate writs to the public who came with complaints and cash. Precedents accumulated on the Register, and for well-known complaints the clerks were ready; the writ was "common form" or "de cursu."* If, however, the complaint was novel, the clerks must consult their superiors in the background.

* We know that in 12 Henry III Letters Patent went to Ireland giving the forms of fifty-one writs "de Cursu" then in ordinary use. (Palgrave, *The King's Council*, 16.)

Now it is plain from the *Provisions of Oxford* (1258) that the Chancellor had been framing new writs, and the Council disliked it. And, naturally, for to make a new writ was in effect legislation—new writ, new right. The Chancellor had to swear that he would seal no writ, excepting writs *de cursu*, without the commandment of the king *and his Council*, who shall be present.*

This enactment seems to have checked permanently development in the English Common Law. The evil was indeed perceived, and by a famous statute † the Clerks in Chancery were encouraged to issue writs by analogy "in consimili casu," consulting among themselves, or in difficulty adjourning the question to Parliament. It seems agreed that the results were not such as might have been looked for, and it was left to another body to take notice of those wrongs for which the stiffness of the common lawyers refused a remedy.

The royal authority had produced the Common Law, and was now from its unexhausted resources to add an Appendix.

In Edward's reign, Parliament, Council, and King's Bench were not organically distinct.

By the end of the fourteenth century, the Council had separated both from Parliament and from the King's Bench. The Council had no specific organisation as a court, no seal, no roll, no stated terms. While in Edward's time the judges were regularly summoned and sworn, in Richard II's reign the great nobles had become politically preponderant, the judges receded and were not summoned, except occasionally for law work.

This is not surprising; the judges had their own courts to attend, and the work of Council was not, except occasionally, judicial. Apparently very few cases were heard at length and determined by Council, for Council was too busy. "It would be hard now," says the learned editor of Vol. 35 of the Selden Society, "to count a hundred cases fully dealt with before 1485." ‡

Its main work was facilitating the hearing of complaints by other courts, and that was done in answer to petitions. It is not an exhaustive statement, but, roughly speaking, petitions or Bills fall into two main classes, those that ask redress for a general grievance, *i.e.* for legislation, those are Bills in Parliament, those that ask redress for a particular injury, are Bills in Council. These latter were sorted out.

---

* Stubbs, *S. C.* 393, 395. † 13 Edw. I, c. 24.
‡ Cases before the King's Council (S. S.) Introd. xx.

An ordinary common law case was sent to the common law courts. But sometimes there was a complaint that no known writ would fit, or a complaint of oppression or violence that the ordinary courts could not effectually handle. Here the residuary royal justice had its opportunity.

But it is plain from recent researches that the Council was not anxious to have this work. The position is rather curious. The Commons are constantly petitioning against the Council's jurisdiction, statutes are passed restraining it.* These statutes are disregarded, the overworked Parliament sends its petitions of law over to Council, which itself is overworked. But there the Council was, ready to deal with emergencies, or with cases that the common law cannot reach, both civil and criminal. If the king's interests were concerned, they stopped proceedings and directed a consultation "loquendum est cum rege." Maritime and mercantile affairs, the sea and aliens, especially the foreign merchant, were outside the common law, the foreigner affected our external relations. These matters, if possible, were referred to special commissions, to chancery, and to admirals who were not very satisfactory.

The early councils do not seem to have claimed any criminal jurisdiction of first instance, and seem to have preferred issuing Commissions of Oyer and Terminer. Parliament disliked the frequency of these commissions, but constantly referred individual cases of riot to Council. So that by consent and custom, Council was forced into doing this work before the Star Chamber Act of Henry VII.

It may be observed that perhaps owing to the predominance of the nobles, the punishments of Council were not severe, especially on great men, and the results not really satisfactory.

Evidence of Parliamentary distrust of these Commissions of Oyer and Terminer is found as early as the thirteenth year of Edw. I. The Statute of Westminster II said :

"A writ of trespass ad audiendum et terminandum (oyer and terminer) shall not be granted before any justices, except justices of either bench and justices in eyre, *unless it be for a heinous trespass where it is necessary to provide a speedy remedy.*"

---

* Notably 42 Edw. III, c. 3. No man is to be put to answer before justices, without presentment or matter of record, or by due process or writ original according to the old law of the land, anything to the contrary to be void.

That is the whole story. Parliament has no objection to this extraordinary power in reserve, but does not wish it to supplant the ordinary law. It also looks a little askance at the methods of Council, which are certainly not those of the common law.

Thus in 1351 the Commons presented a petition, "that no free man be put to answer for his free tenement, nor for any matter *which touched life or limb*, nor be fined or ransomed 'par apposailles' before the King's Council or before his ministers, but only by the accustomed law of the land."

It may be observed that the Star Chamber never inflicted capital punishment, perhaps because of this petition. The word "apposailles" is said to mean "viva voce examination": if this is so, it is a protest against the practice usual in the ecclesiastical courts of cross-examining the prisoner. Such a procedure was unknown to the common law, and in deference to this protest the Council abandoned the practice.

Although through the reigns of Edward III, Richard II, and Henry IV, V, and VI, the Commons constantly protested and petitioned on the subject of the Council's jurisdiction, yet the objections seem rather to have been against the methods by which and the occasions on which the jurisdiction was exercised than against the jurisdiction itself. Defendants were arrested by the Council's pursuivants on bare suggestions which might be frivolous, or even malicious. On the other hand, the Council had a long arm, and could deal effectively with the most powerful offenders when the ordinary law could not. On the principle Council and Commons agreed, for in the petitions temp. Richard II, where it is prayed that people may not be forced to answer finally in the Council in matters cognisable by the ordinary courts, it is desired that this should be so in cases of oppression; and the Council's answer is almost always the same, that the petition is granted, except in cases where one is poor and the other so rich that no remedy can be had.

The Council's jurisdiction was regarded as in its nature auxiliary to the ordinary law, and on this view it claimed prerogative jurisdiction in cases of dishonesty which were not so tangible as to give rise to a prosecution at common law, and granted writs of *ne exeat regno* against fraudulent foreign debtors, who were making off and leaving their debts behind them.

The Council's Power of Holding to Bail.—In answer to one of the usual complaints of the Commons in 2 Ric. II, the Council say that where the common law cannot have its due course the

Council may send for a man and put him to answer for his misprision, and also *compel him to give surety by oath, or in other manner as seems best for his good behaviour*, and not to disturb the common law.

Here we find an allusion to a very important point of Council authority, for when the law of frankpledge became obsolete the justices of the peace acquired by their commission a power to hold persons to bail for the preserving of popular tranquillity: or a party apprehending injury could sue out a writ commanding sheriff or justices to take bail, and the names of the manucaptors were thereon returned into Chancery.

Then by a slight change the party gave bail in Chancery in the first instance. The last step was that people called before the Council for misdemeanours, etc., were required to give bail either there or before the Council in Chancery.

This power of holding to bail was a very powerful weapon. Thus all the inhabitants of Bury entered into their individual recognisances in £10,000 not to assemble in any illegal meetings nor commit any offence adjudged to be "horrible" by the Council, the justices, or the law of the land.

Apart from the commissions of Oyer and Terminer, the Council used:

(1) The writ of Præmunire,* which went to the sheriff to warn the defendant to appear and issued on suggestions filed before Council.

(2) The writ Quibusdam certis de causis,† a writ of Privy Seal which went to the defendant himself. (A.D. 1346.)

---

* "Edwardus, &c., vicecomitibus London salutem. Quibusdam certis de causis vobis mandamus firmiter iniungentes quod præmunire faciatis H. C. (& ōrs) quod quilibet eorum sub pœna centum librarum in propria persona sua sit coram consilio nostro apud W. hac instanti die Martis ad loquendum cum eodem consilio super iis quæ eis tunc ibidem exponentur ex parte nostra et ad faciendum ulterius et recipiendum quod per dictum consilium ordinari contigerit in præmissis. Et hoc sub incumbenti periculo nullatenus omittatis. Et habeatis ibi nomina illorum per quos eos præmunire feceritis et hoc breve. Teste meipso," &c.

† "De essendo coram consilio Regis. Rex Ricardo capellano uxoris Johannis de Grymmestede chivaler salutem. Quibusdam certis de causis coram consilio nostro propositis, tibi præcipimus firmiter iniungentes quod omnibus aliis prætermissis, sis in propria persona tua coram dicto consilio nostro in cancellaria nostra, et ad faciendum ulterius et recipiendum quod curia nostra consideraverit in hac parte. Et habeas ibi hoc breve. Teste custode apud Eltham xxvi die Decembris. Per consilium." (Rot. Claus. 20 Edw. III, p. 2, m. 4 d.)

(3) The writ of Subpœna* which also went to the defendant. (A.D. 1363.)

This writ only differs from the one previous by the addition of the words "ex parte nostra" and the subpœna clause. When the words *ex parte nostra* disappeared from the subpœna or the subpœna clause was attached to the writ of Privy Seal, the wording was the same, and the terms "subpœna" and "Privy Seal" became interchangeable.

The king had two seals, the Great Seal and the Little Seal. When the Great Seal became the "clavis regni," the king required another for his own personal and private use, and naturally a functionary to look after it, presently known as the Lord Privy Seal. By the fourteenth century it had come to be used for State business, and the keeper was the head of an office. It was used by the Council, for the process was less cumbrous and more secret. Petitioners, moreover, found it cheaper. The process which, though more expensive, offered more security, was that of the Great Seal in Chancery. It may be, as Mr. Baldwin suggests,† that the respective use of the Privy and Great Seal had some connexion with the attraction of crime to the Council,‡ and cases about property to the Chancellor.

In 1453 Parliament, probably alarmed by Cade's rebellion, and perhaps seeing that amid the anarchy produced by the Wars of the Roses the lawlessness of the nobles was more to be feared than the tyranny of the prerogative, placed for the first time the Council's authority on a statutory basis, and an Act § was passed which is of historical importance.

---

* "Edwardus, &c., dilecto sibi Ricardo Spynk de Norwyco salutem. Quibusdam certis de causis tibi præcipimus firmiter iniungentes quod sis coram consilio nostro apud Westmonasterium . . . ad respondendum super hiis que tibi obiicientur ex parte nostra, et ad faciendum et recipiendum quod curia nostra consideraverit in hac parte. Et hoc sub pœna centum librarum nullatenus omittas. Teste me ipso apud W."

† *The King's Council*, 259–261.

‡ There is a case which illustrates the state of the country and the relation of the Council to public order. In the fifth year of Henry VI, one William Wawe, a highwayman "quidam iniquitatis filius," had broken out of prison and robbed churches. The Council offered £100 to any one who would produce "coram nobis ipsum seu corpus aut caput ipsius si interfectus fuerit." He took sanctuary at Beaulieu Abbey, and the abbot was instantly called on to produce his franchises, "si quas habeat de retinenda persona Willī Wawe," heretic, highwayman, traitor, &c. What happened does not appear, but William was shortly afterwards arrested and satisfactorily hanged. (Nicholas, iii. 257.)

§ 31 Hen. VI, c. 2.

It recites that suggestions and complaints have been made to the king and the lords of his Council of great riots, extortions, and oppressions ; that his writs under the Great Seal and Letters of Privy Seal, summoning offenders before him in his Chancery, or before him and his Council, are frequently disobeyed in contempt of the king ; and it enacts that the Chancellor shall in such case issue Writs of Proclamation to the sheriff of the county, the proclamation to be made three times, with heavy penalties of forfeiture, fine, and disability on contumacy. It was a seven years' statute only, but the doctrine that the disobedience to a privy seal or a subpœna was a contempt against the king became well settled. Outlawry did not issue on this new process, but it was enforced by a "commission of rebellion."

Sir Francis Palgrave gives a case which shows the Council at work. The complaint of John, Lord Strange.*

Roger Kynaston, who was second husband of plaintiff's mother, unlawfully retained certain lordships on the Welsh Marches in which his wife had only a life interest. There had been an arbitration and award against Kynaston ; Kynaston would not obey it, being very powerful. Strange came to the Council. Letters missive under the signet were issued ; Kynaston paid no attention ; then letters issued under the privy seal ; Kynaston waylaid the king's messenger, John Gough, and treated him contumeliously, took away his letters and threatened to kill him, if he did not return and say "he coude nat mete with the said Roger" ; fresh letters were then issued and treated with contempt. Then issued a writ of proclamation to the sheriff of Salop, but the defendant did not come in.

A commission of rebellion was then directed to the Earl of Shrewsbury, Sir William Herbert, and the Sheriff of Salop ; Roger then fled to the mountains of Wales, and remained at large.

They do not seem to have been very active, so the plaintiff comes and asks for a privy seal to issue to them directing them to execute their commission, with concurrent writs of proclamation to the sheriffs and justices of Salop, Flint, Hereford, and Chester, directing them to assist in arresting Roger, and that none is to help him on pain of being put out of the king's protection.

---

* The date of this complaint is 1467, or seven years after the Act of 1453 expired. Yet the procedure adopted was that prescribed by the Act. It was frequently the custom of Government to treat as in force Acts which had not been formally repealed.

And on November 12, 7 Edw. IV, it was ordered by the King and Council, sitting in the "Starre Chamber," that the Chancellor should make these writs.

What then happened we do not know, but Roger seems to have established his claim to the lands. He was a zealous Yorkist, and this may account for the tenderness with which he was treated, and he subsequently received many marks of royal favour from Edward IV and Richard III.

The period which lay between Edward III and Henry VII was unfavourable to regular and peaceful development. The minority of Richard II, his deposition, the absences of Henry V from the kingdom, and the minority of Henry VI, tended to increase the power of the nobles. They dominated Parliament and Council. Then came the Wars of the Roses, a period of disorder, when the machinery of government ceased to function.

It is suggested that this paralysis of Council jurisdiction powerfully helped the Chancellor in establishing himself in an independent position. Up to this time, although one of the most important members of Council, he had been regarded as the Council's great executive official. Now he became an independent judge and the Court of Chancery exercised the residuary jurisdiction in civil matters.

From the accession of Henry VII the legal history of the Council tends to become the history of its Committees—for such they were—the Courts of Star Chamber and Requests. The Council seems gradually to have discarded its purely judicial and retained its deliberate and executive functions : * it is by the end of Elizabeth's reign almost entirely immersed in political and foreign affairs. It is probable that, being without assistance from professional lawyers, it had little time or inclination to touch what it did not sufficiently understand. From some of the entries in the Register it looks as though the Council sat in vacation—when the Star Chamber was "up"—without the assistance of the judges, and took business, perhaps urgent business, which "Her Majesty's Court of Star Chamber," as we find it styled in 1588,† would otherwise have dealt with.

Thus at Westminster, on July 14, 1562, the case of "certaine

---

* A gap in the Council Register, which extends from the thirteenth year of Henry VI to the thirty-second year of Henry VIII, makes the stages of this process obscure.

† On January 28.

scollers of the University of Oxford" came up. Six of the "chiefest of the committers of this disorder" are to be sent "hither," the rest to be bound personally the first day of next term *in the Star Chamber*.*

On May 1, 1567, at Westminster, a jury of London being this day before the Lords, were commanded to appear before *their Lordships* the morrow next after the last day of the Term *in the Star Chamber*, to be there further ordered.†

The statute which abolished the Star Chamber did not affect the right of a suitor in one of the foreign dependencies of the Crown to apply for justice to the King in Council. Petitions from the adjacent islands and from the Plantations were thus unaffected.

In 1832 it became the Court of Appeal in ecclesiastical cases, a jurisdiction handed on to the Judicial Committee next year.

The Judicial Committee of the Privy Council.

This court was formed in 1833,‡ and its composition has been subsequently modified.§

In 1887 || it was enacted that the Judicial Committee shall include such Privy Councillors as shall hold or have held "high judicial office" within the meaning of the Appellate Jurisdiction Act, 1876, and this Act.

"High Judicial Office" means Lord Chancellor of Great Britain and Ireland, a paid judge of the Judicial Committee, or a judge of the Superior Courts of Great Britain and Ireland; *i.e.* in England of the High Court of Justice and the Court of Appeal, or the Superior Courts of Law and Equity as they existed before the Judicature Act; in Scotland, of the Court of Session; in Ireland, of the Superior Courts of Law and Equity in Dublin. It also includes the office of a Lord of Appeal in Ordinary, and of a member of the Judicial Committee.

By statutes passed in 1895, 1908, and 1913 ¶ it was provided that if any person being or having been Chief Justice, Judge, or Justice of the Supreme Court of Canada, or of a Superior Court of any province of Canada, or of the High Court of Australia, or of the Supreme Court of Newfoundland, or of New South Wales,

---

* Dasent, vii. 114. † *Ibid.* 347. ‡ 3 & 4 Will. IV, c. 41.
§ 34 & 35 Vict. c. 91; 39 & 40 Vict. c. 59.
|| 50 & 51 Vict. c. 70.
¶ 58 & 59 Vict. c. 44; 8 Edw. VII, c. 51; 3 & 4 Geo. V, c. 21.

New Zealand, Queensland, South Australia, Tasmania, Victoria, Western Australia, the Union of South Africa, or of any other Superior Court in the Crown's dominions named in that behalf by the Crown in Council, is a Privy Councillor, he shall be a member of the Judicial Committee : such persons not to exceed seven in number at any one time. Any person being or having been Chief Justice or Judge of any High Court in British India and being a Privy Councillor shall, if His Majesty so directs, be a member of the Judicial Committee, such persons not to exceed two in number. Power also is given to the Crown to direct any one who is or has been a colonial judge to act as assessor to the Judicial Committee on appeals from his colony.

It can hear civil and criminal appeals from the colonies, Indies, and foreign dominions.* But as regards appeal in criminal cases "the rule has been repeatedly laid down and invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the form of legal process or by some violation of the principles of natural justice or otherwise, substantial or grave injustice has been done." †

Although the Privy Councillors as committing magistrates (and every Privy Councillor is in the commission of the peace for every county in England) are constitutionally empowered "to inquire into all offences against the government and to commit the offenders to safe custody," ‡ it is now customary to send such offenders like ordinary criminals before the magistrates in the usual way.

---

* Unless the right of the subject to petition the Crown for redress of grievance is abridged as in the Australian Constitution Act (63 & 64 Vict. c. 12, § 74).

† *Ex parte Deeming*, 1892, A. C. 422.

‡ Blackstone, *Comm.* i. 230–1.

CHAPTER XI

THE STAR CHAMBER

The Proceedings and Ordinances of the Privy Council from the tenth year of Richard II are published by direction of the Commissioner of Public Records. Their first editor was Sir H. Nicholas, who was succeeded by Mr. Dasent.

The Council Register or Book of the Council stops abruptly in the thirteenth year of Henry VI and begins again in the thirty-second year of Henry VIII. From that date we have the Council records down to the year 1596.*

Mr. Baildon's Reports of Cases in the Star Chamber begin in 1593 and go down to 1609. The writer of this book was John Hawarde of the Inner Temple, Bencher 1613, Reader 1625, who apparently sat in court, and took notes, which he afterwards wrote up.†

The Star Chamber was built conveniently "near the Receipt," *i.e.* the Treasury. It was begun in 1347 and finished the next year, and immediately became the Council room. The name "Sterred Chamber" is first found in or about 1348 in the tilers' accounts of 21 & 22 Edw. III.‡

Down to the Tudor times, it may be said with confidence that the words "in the Star Chamber" are a mere geographical expression; they were not part of the "style" of the court. The minutes of the Council show that when they were at Westminster they usually sat there.

Although the Council gradually delegated its extraordinary

---

* The Camden Society has also published *Cases heard in the Star Chamber*, 1631–2, vol. 39, N. S.

† The MS. is mentioned in *The Ninth Report of the Hist. MSS. Comm.*, p. xvii, and App. II, p. 406.

‡ Queen's Remembrancer's Ancient Miscellanea $\frac{873}{22}$.

civil jurisdiction to the Chancellor, it retained its administrative duties, including the maintenance of public order. Its functions were magisterial rather than judicial. Coke * observes that the Council in ancient times rarely sat judicially except for enormous and exorbitant causes, and not such as ordinary courts could condignly punish, lest it should draw the King's Council from matters of State to hear private causes, and the principal judges from their ordinary courts of justice.

So we find that *temp.* Richard II, the regular Council is sworn, but not the ordinary judges who, however, may be summoned to give advice on law.†

It may be noted that the "articles of government" of Council in 2 Hen. VI ‡ find it necessary to provide for the presence of judges *where the Council is not learned enough*, and that similar provision is made in the articles of 5 Hen. VI and 8 Hen. VI. It will be remembered that in the minority of Henry VI the nobles seized the reins of the government, and controlled the Council.

In cases of grave offences, especially if it was thought that owing to influence there might be a failure of justice, the Council took the case, and sat in the Star Chamber. But it does not seem that they were anxious to interfere.§

There never was, till the reign of Henry VII, a "Court of Star Chamber." If the king was in London, the Council usually sat in this room; if he was away, it accompanied him. In the precedents which Coke preserves from Edward III onwards, the style of the court is "coram rege et consilio," the words "in the Star Chamber" being sometimes added.

I have mentioned before, that the middle of the fifteenth

---

* *Inst.* iv. c. 5.

† So on February 10, 1403, there were present "les iustices de lun Banc, et de lautre." (Nich. i. 197.)

‡ Rot. Parl. iv. 201.

§ *Ibid.* See a case of 1428 (7 Hen. VI), when one Roger, having confessed to a breach of the statute regulating the export of wool, all judges, including the three chiefs, were summoned, and separately questioned before the King's Council in the Star Chamber, and asked whether he should be let off with a fine or sent to trial. The judges said "fine him, for he will probably bribe the jury." To which the Lords yielded, and ordered the Treasurer accordingly. Fined 200 marks, or more if he can pay (Nich. iii. 313). Cases of this sort should be read in connexion with the Articles of Business that Council drew up two years earlier, which said that in matters touching the king's prerogative and freehold, as against his subjects, in which matters the Council is not learned, the king's judges are to be called, and their advice entered as of record (Rot. Parl. v. 407 b). The judges are summoned, but the Lords of the Council give judgment.

century was marked by civil war, the paralysis of government and the disappearance of public order. In these disturbances, the nobles were to the fore with troops of armed retainers, great riots were frequent, and the Councillors themselves were not averse to using their position to their own profit, or to protect their friends.*

The Star Chamber Act.

To re-establish the reign of Law, Henry VII passed his famous Star Chamber Act, and no better account is needed of the state of affairs than the preamble of the statute.†

Object of 3 Henry VII, c. 1.—What then was the object and the effect of passing what is known as the Star Chamber Act of Henry VII? It runs as follows:

"The King, our said Sovereign Lord, remembereth how, by unlawful maintenance, giving of liveries, signs and tokens, and retainders by indentures, promises, oaths, writing or otherwise embraceries of his subjects, untrue demeanings of sheriffs in making of panels, and other untrue returns, by taking of money, by juries, by great riots, and unlawful assemblies, the policy and good rule of this realm is almost subdued, and for the not punishing of these inconveniences and by occasion of the premises little or nothing may be found by inquiry, whereby the law of the land in execution may take little effect, to the increase of murders, robberies, perjuries, and unsureties of all men living, and losses of their lands and goods, to the great displeasure of Almighty God. Therefore it is ordained for reformation of the premises, by authority of the said Parliament, that the Chancellor and Treasurer of England for the time being and Keeper of the King's Privy Seal, or two of them, calling to them a bishop and a temporal lord of the king's most honourable council and the two Chief Justices of the King's Bench and Common Pleas for the time being, or two other justices in their absence, upon bill or information put to the said Chancellor for the king or any other, against any person for any misbehaviour before rehearsed, have authority to call before them by writ or by Privy Seal the said misdoers, and them or other by their discretion by whom the truth may be known, to examine and such as they find therein defective to punish them after their demerit, after the form and effect of statutes thereof made, in like

---

* See Fortescue, *Government of England*, c. xv.

† 3 Hen. VII, c. 1.

manner and form as they should and ought to be punished as if they were thereof convict after the due order of the law." *

The object of Henry in getting this Act is fairly clear. He desired the restoration of order, a Government that should govern, and himself to be the Government. And he succeeded. The Tudor period marked the high-water level of personal government. The Council was given statutory status, powers, and jurisdiction.†

It is, doubtless, a matter for observation, that so far as is known there is no record of a court composed according to the prescription of the statute, and that the court, even in the time of Henry VII, tried cases of detinue, false imprisonment, and defamation, a jurisdiction not supported by the terms of the statute, nor was the procedure *ore tenus* warranted by the Act.

The true view would seem to be that the old constitutional court of the King in Council was rejuvenated, and that the procedure and powers expressly allowed to a section of the Council were taken as conferred on the whole.‡

---

* That the preamble of the statute was truthful we have some evidence in a report in the Year Book, 7 Hen. VI, 9. An assize in Cumberland was adjourned to London, and the reason being asked it was said that it was a great matter, and that the parties came with great routs of armed men, "plus semble pur vener a bataille que al assize."

From the researches of an American lady, Miss Schofield of the University of Chicago, in the Harl. MSS. 6811, Art. 2, and Add. MS. 4521, Art. 9, and Harg. MS. 216, it seems that in his two first years Henry VII sat at least ten times with his Council in the Star Chamber (on one occasion (Feb. 9) the Council numbering twenty-six), and considered riots and political business.

In the Year Book, 2 Ric. III, fos. 2 and 11, we find the cases of the Spanish merchant, and the Waterford merchants, "coram rege et consilio." The opinions of *all* the judges were taken in *Camera Scaccarii*. On the other hand, in Year Book, 2 Hen. VII, Mich. T., fol. 9, the justices of the Common Bench desiring advice, "surrexerunt et allerent al Chancelier & Seigniors de Star-Chambre."

† The statute gives the tribunal no name; in the Parliament Roll it is headed "Pro Camerâ Stellatâ."

‡ In *Chambers' case* (4 Cro. 168), where the defendant, who had been committed to the Fleet prison by the Star Chamber for words he used at the Council table, being brought up on his *habeas corpus*, prayed deliverance because st. 3 Hen. VII, c. 1, "which is the foundation of the Court of Star Chamber, doth not give them any authority to punish for words only, all the court informed him that the Court of Star Chamber was not created by that statute, but was a court many years before," herein agreeing with Coke and Bacon. (See also Hudson's *Treatise on the Star Chamber*, pt. ii, § 2.)

In 1508 (13 Hen. VII) the *Abbot of Shrewsbury's case* was heard before the Chancellor, Fineux, C.J., of the King's Bench; Tremayle and Brudenell, his puisnes; Rede, C.J., of the Common Pleas; Kingsmill, Fisher, and Butler, his puisnes; Hody, the Chief Baron of the Exchequer; and Sir Thomas Docwra, Prior of St. John of Jerusalem, who was a temporal lord.*

Hudson,† who had access to the records as clerk of the court (*temp.* Car. I), states positively that in the tenth, eleventh, and twelfth years of Henry VII cases were more often heard before the President of the Council‡ than before the Chancellor, Treasurer, or Lord Privy Seal; and that when none of these four lords were present other lords sat for the determining of causes; and that during the reigns of Henry VII and Henry VIII seven or eight bishops used to frequent the court, the number of councillors attending being from thirty to forty, though the numbers fell off in Elizabeth's time, when the lords who were not of the Privy Council ceased to come.§

Before and after the Act the court seems to have been made up of much the same councillors. They gave judgment with the advice and assent of the judges of whom the statute said two must be present, and this direction seems to have been scrupulously obeyed.‖

It will be remembered that in 1351 the Council had given up examination on oath.¶ After the Act, this procedure was considered to belong to the Star Chamber and to be coextensive with its jurisdiction express or implied. Again, when the seven-year statute of 1453** expired, the process by subpœna or Privy Seal had become irregular. This was now given statutory validity.

Both Coke and Bacon were Privy Councillors, and are credible witnesses on the constitution of their court.

---

* See *Select Cases in the Star Chamber*, xxxv. (Seld. Soc.), edited by I. S. Leadam.

† "Of the Court of Star Chamber," *passim.*

‡ The President of the Council did not get statutory recognition till 21 Hen. VIII, c. 20.

§ The statute gives the tribunal no name; in the Parliament Roll it is headed "Pro Camerâ Stellatâ."

‖ *The Abbot of Shrewsbury's case*, Pat. Rolls. Hen. VIII, pt. 1, m. 27.

¶ *Ante*, p. 71.

** *Ante*, p. 74.

Coke's description.—"The judges of the court are the Grandees of the Realm, the Lord Chancellor, the Lord Treasurer, the Lord President of the King's Council, and the Lord Privy Seal, all the Lords Spiritual and Temporal and others of the king's most honourable Privy Council, and the principal judges of the realm and such other Lords of Parliament as the king shall name. . . . And the court cannot sit for the hearing of causes under the number of eight at least. This court . . . doth keep all England quiet."

"It is, or may be, compounded of three several Councils:

"(1) Of the Lords and others of His Majesty's Privy Council, who are *always judges without appointment.*

"(2) The Judges of either Bench and Barons of the Exchequer are of the King's Council *for matters of law;* and the two Chief Justices, or in their absence two other Justices, are *standing judges of this Court.*

"(3) The Lords of Parliament are properly *De magno consilio regis*, but neither these, being not of the King's Privy Council nor any of the rest of the Judges or Barons of the Exchequer, are standing judges of this Court; * *i.e.* they must be summoned and sworn *ad hoc.*"

---

* Coke, *Inst.* iv. c. 5.

On this passage we must remark that by Coke's time a distinction had appeared between Privy and ordinary Councillors, *i.e.* the consiliarii nati; and that by what Hudson seems to consider a usurpation, the Privy Councillors claimed to occupy the place once held by the Councillors generally, viz. that they were as such judges of the court, while the Lords, the consiliarii nati or hereditary Councillors of the Crown, had to be summoned and sworn *ad hoc.* Hudson mentions the thirtieth year of Elizabeth as about the date of this change, barons and earls not being of the Privy Council forbearing their attendance.

Coke's statement of the position of the two Chief Justices also requires comment. It would seem from the exhibits in the *Abbot of Shrewsbury's case* (1508) (v. sup.), that judgment was given by the councillors on the advice of the judges. It was, it appears, "error" if the chiefs, the "standing judges," were not called in, under the statute, while the other judges could be called on to advise if wanted. The indications are that the judges occupy the same position as before in Henry VI's reign: they give advice, and their advice must be attended to; but the judgment is not theirs. It might be that a Chief Justice was a Privy Councillor, when his position would be better. So we find in the S. C. lists of attendances (May 18, 1599) a note against the names of the two chiefs, "un esteant priuye counseller," which intimates that the other was not.

The style of this court (which is commonly and conveniently called the Star Chamber) is according to Coke "coram rege et consilio."

So Bacon says, "The Court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons, counsellors, peers, prelates, and chief judges." *

This court of Coke and Bacon is in reality and style the same court which existed before the reign of Henry VII.

Although Council and Star Chamber theoretically exercised concurrent jurisdiction, and the same Privy Councillors attended,† there is this distinction that in the Star Chamber we find judges who are not Privy Councillors. Besides this, the Council sat in private. The Star Chamber sat openly and observed the law terms.

They both had the same clerk and the Star Chamber process ran in the name of the Council.

Something may now be said on Council procedure. The first step was the Bill or Petition. This was quite informal; at first it was not necessarily in writing, it might complain of "persons unknown" and ask generally for a remedy. It could be presented to King, Council, Parliament, Chancellor, in any combination.

In matters of crime, the Council acted on "information" or "suggestion." This was much disliked by the Commons, who complained that the Council pursuivants arrested people on suggestions which were frivolous or malicious. But finally the S. C. Act legalised the procedure by Bill or Information.

Civil Procedure.

In cases between private individuals, the plaintiff filed a bill, to which the defendant put in an answer and was sworn to it. If he refused to answer he was taken to have confessed the bill, and

---

* *Life of Henry VII* (Spedding), vi. 85.

† A comparison of Hawarde's notes with the Proceedings of the Privy Council of the same date, shows this, and also that the two meetings were not allowed to clash, but that if Council business had to be done on a S. C. day, the Council did it in the S. C. either before or after the strictly legal business.

judgment was thereupon given. Otherwise evidence was taken by interrogatories and depositions. If a question of fact could be more conveniently determined at common law, the court directed the issue to be tried before a jury, and the verdict certified into the Star Chamber.

A curious feature pointed out by Mr. Baldwin is that in civil suits the parties were required to make full submission, otherwise the proceedings being extra-legal could not go on. Jurisdiction is founded in consent.

Criminal Procedure.

(1) *Ore tenus.*—This was only possible in cases where the defendant confessed his offence. The proceedings *ore tenus* originated either in "soden reporte," or by "the curious eye of the State or King's Council prying into the inconveniences and mischiefs which abound in the Commonwealth." The accused person was without Information privately arrested and examined *viva voce* without oath by the Council. Anything he said was taken down, and he signed his answers, which he had again to confess in open court. But if his confession was "set down too short, or otherwise than he meant, he may deny it, and then they cannot proceed against him but by Bill or Information, which is the fairest way." * If his admissions were unfortunate he was condemned *ex ore suo*, and judgment accordingly. If he declined to answer he went to prison till he thought better of it.

(2) *By Attorney-General's Information.*—The defendant was brought up on a writ of præmunire or subpœna. To the information he put in an answer, which was required to be signed by counsel,† and if such an answer was not

---

* Coke, *Inst.* iv. 5.

† This requirement was not merely formal, for a counsel who set his hand to anything unadvisedly would probably regret it. Mr. Baildon gives a case (p. 32) where a counsel who had signed a bill imputing perjury and subornation to an archdeacon and others, the charge not being substantiated, was disbarred for seven years. Some plain language was heard now and then. Lord Keeper Egerton addressing counsel said, "You muste goe to schoole to learne more witte, you are not well aduysed, you forgette yo^{r}. place, and

forthcoming he was taken to have confessed the information, and judgment accordingly. After his answer was put in, he was examined on written interrogatories and the *ex officio* oath was given him. To this oath the most violent objection was expressed. It was in the form frequently used at the present day in courts of justice, and known as the *voir* (*vrai*) *dire* : "You shall true answer make to all such questions as may be demanded of you, so help you God." It was said to be contrary to the law of God and the law of nature, for by them *nemo tenetur prodere seipsum.* Mr. Justice Stephen observes that he thinks that the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions. Witnesses were then privately examined against him and judgment followed.

If ordinary interrogatories failed, torture was used in the search for truth, but death was not inflicted. But other punishments were : fines, imprisonment, the pillory, and facial alterations. We must not omit an instance, given by Dicey, of savage humour. A man who objected on religious grounds to eat swine's flesh, was to be imprisoned and fed on nothing but pork.*

---

to be plaine it is a lye." On another occasion the Lord Keeper "made delivery of his conceit for solicitors" (as opposed to attorneys) . . . "that they are caterpillers del common weale" and maintenance would lie against them.

* Some cases from the *State Trials* illustrate the actual working of the Star Chamber. Sir John Hollis and Sir John Wentworth were prosecuted "for traducing the public justice" (*State Trials*, 1022). A man called Weston had been hanged for poisoning Sir Thomas Overbury: Wentworth and Hollis went uninvited to the execution. Wentworth asked Weston if he really did poison Overbury, saying "he desired to know that he might pray with him." Hollis "wished him to discharge his conscience and satisfy the world." Hollis, besides, when the jury gave in their verdict, had said, "if he were on the jury he would doubt what to do." Sir Francis Bacon, who was then the Attorney-General, with great grace maintained that these remarks implied that perhaps Weston's guilt was not absolutely certain. The defendants excused themselves in a polite manner. Sir Edward Coke pronounced sentence, in which he referred to cases, beginning with the case of Abimelech, made some observations on the bad habit of going to executions, and finally by way of "censure" Sir John Hollis was fined £1,000 and Wentworth

Its Abolition.

The court was abolished by statute 16 Car. I, c. 10. During the Tudor *régime* it had played a necessary part in the national life. The testimony of contemporaneous writers to the confidence it inspired, its power, gravity, and vigilance is remarkable. It "kept all England quiet."

The Tudors enjoyed great personal ascendancy. But towards the end of Elizabeth's life, Parliament began to be a little difficult. That great woman, who knew when and how to yield, surmounted or evaded her difficulties, but not so the shambling pedant who succeeded her. His antiquated notions of the prerogative brought him into conflict with Parliament and the Common Law Courts. The Council naturally took the side of the Prerogative. For some little time past the jealousy felt by the common lawyers of the Star Chamber had shown itself in attacks on its jurisdiction, but without much success so long as the Council kept to its proper business and steered clear of politics. But when the Star Chamber was used by the Crown to strike at its political opponents, the lawyers were joined by Parliament, and their alliance was fatal.

We may give an instance of its severity in a political matter.

In 1632 William Prynne * was informed against for his book

1,000 marks, and each was imprisoned a year in the Tower. This was in 1615. (*S. T.* 1022.)

In 1632 Mr. Sherfield was prosecuted for breaking a glass window in St. Edmund's church in Salisbury. He admitted that he had done so, but justified his conduct because the window "was not a true representation of the Creation, for it contained divers forms of little old men in blue and red coats and naked in the head, feet and hands, for the picture of God the Father, and the seventh day he hath therein represented the like image of God sitting down taking his rest, whereas the defendant conceiveth this to be false." Besides Eve was represented as being taken whole out of Adam's side, whereas in fact a rib was taken and made into Eve. For these and other reasons the defendant made eleven holes in the window with his pike-staff and, said one of the witnesses, "the staff broke and he fell down into the seat and lay there a quarter of an hour, groaning." For this Mr. Sherfield was fined £500. (3 *S. T.* 519.)

Mr. Richard Chambers (*S. T.* 373), a London merchant who had had a quarrel with some under-officers of the Customs, was summoned before the Privy Council, when he said, "that the merchants are in no part of the world so screwed and wrung as in England, that in Turkey they have more encouragement." For this he was fined £2,000 and ordered to make a written apology. He refused to do it, and was imprisoned for six years.

* *S. T.* 561.

called *Histrio Mastix*, to which he answered that the book had been licensed, and his counsel apologised for the style of the book, "for the manner of his writing he is heartily sorry that his style is so bitter and his imputations so unlimited and general." The sentence on Prynne was that he was to be disbarred and deprived of his University degrees, to stand twice in the pillory, to have one ear cut off each time, to be fined £5,000 and to be perpetually imprisoned without books, pen, ink, or paper. Five years afterwards Prynne, Bastwick, and Burton were tried for libel and were all sentenced to the same punishment as Prynne had received in 1632. As Prynne, however, had lost both his ears already he was branded on the cheeks.

It should, however, be said, as Mr. Baildon has pointed out, that these enormous fines were often imposed "in terrorem populi," and afterwards reduced. He gives a list of such reductions :* for instance, a fine of £1,000 is reduced to £100, £500 to £30, and so on. And in fairness it must be admitted that cropping the ears and slitting the nose were statutory punishments for offences such as brawling in church, and provision was carefully made by statute for branding in case the offender's ears had already gone.

Civil Business in the Star Chamber.—In addition to its criminal business, according to Mr. Baildon, the Star Chamber exercised considerable jurisdiction in cases of disputed customs of Manors, and in cases where there was a great number either of plaintiffs or defendants, also where foreigners were parties, in deceits of merchants, in causes between corporations, mayors, and commonalties, bailiffs and burgesses, or great and mighty men "where interest drew malice and partaking."

Besides this, a great deal of miscellaneous business was transacted there, proclamations of Orders in Council were made, the Assay of the Mint was held, and the Lord Chancellor's annual charge to the judges and justices of the peace delivered.

The statute which abolished it recites that the matters examinable in the Star Chamber are all capable of being duly remedied at common law, and that "the reasons and motives inducing the creation and continuance of that court do now cease." Though the statute mentions, as an irregularity, that the Council does not keep a Plea Roll, it does not allege that the court was illegal.

---

* *Les Reportes in Camera Stellata*, p. 411.

Even Sir Edward Coke said "it is the most honourable court (our Parliament excepted) that is in the Christian world."

The sinister fame of the Court of Star Chamber has thrown into shadow that of other courts of analogous character and jurisdiction. The Court of Requests, of which we find some rudimentary indications in the reign of Richard II, was a court of the Privy Council sitting to hear the complaints of poor men or the king's household. This will be dealt with later.

The President and Council: (1) of Wales; (2) of the North; (3) of the West.—Some other courts with powers as ample and methods as summary as those of the Star Chamber assisted the Common Law. By Letters Patent, Henry VIII established the Courts of the President and Council in Wales and the President and Council of the North. The Court of the President and Council in the West was erected by Stat. 32 Hen. VIII, c. 50, with like authority. All three courts were subsidised by Parliament, so that "his true subjects . . . have undelayed justice daily administered." They had unlimited civil and criminal jurisdiction.

Although these courts fell with the Court of Star Chamber, they were not abolished in terms. The Court of the President and Council of the Marches of Wales was expressly abolished in 1688.*

The President and Council of the North had co-ordinate jurisdiction with the Border Commission which was established after the union to prevent the "thieving trade." Commissions of Oyer and Terminer were directed to an equal number of Englishmen and Scotchmen, extending to certain limits on each side of the Border. "And these meet in their sessions and hang up at another rate than the assizes, for we were told that at one session they hanged eighteen for not reading *sicut clerici*. This hath made a considerable reform." †

Lasting Effect on the Criminal Law.—The main offences punished in the Star Chamber were for the most part unknown to the common law—perjury, forgery, riot, maintenance, fraud, libel, and conspiracy. Cognisance was also taken of *attempts* to commit certain offences, such as coining, murder, burglary, and poisoning, and of blackmailing and "entangling young gentlemen

---

* 1 Will. & Mary, c. 27.

† *Lives of the Norths*, i. 286, which see for an instance of Border justice.

in contracts of marriage to their utter ruin, *to which no statute extendeth.*" (Hudson.)

The Star Chamber permanently enlarged the limits of the English Criminal law by enriching it with a list of common law misdemeanours which, before unknown or little considered, we owe to its vigilance as *custos morum*; and when the court fell never to rise again the King's Bench without difficulty adopted the Star Chamber tradition.

CHAPTER XII

THE CHANCELLOR

When the line of Justiciars ended, a vacancy was made into which the Chancellor stepped. He was the head of the Secretariat, he kept the Great Seal, and he presided over the Common Law writ office, the "justice shop," and early in his history he was the head of the Royal chaplains, and lived in the Palace. At the beginning of the fourteenth century he was the head of a well-organised department, the "Cancellaria."

About this time a practice arose of assembling Council in cases of difficulty or interest in the Chancery, "consilium in cancellaria." The councillors were summoned by the king's writ to the Chancellor, issued *ad hoc*, and the Chancellor cited the parties, presided, and conducted the proceedings, but the judgments were judgments of Council, at any rate in form.

Then petitions come in sometimes addressed to Chancellor, sometimes to Council and Chancellor, but Parliament in its frequent complaints against this jurisdiction does not distinguish between a summons before the Chancellor and one before the Council.*

In Richard II's reign we find the Chancellor summoning the Council without a king's writ, but all the early bills are adjudicated on by Council, though the number of councillors attending gradually shrinks, and in the fourteenth year of Edward IV the Chancellor makes an equitable decree alone.†

The Chancery sat in vacation and was always open to suitors, see the statute 13 Hen. IV, c. 7, giving the enforcement of the law against rioters, to "the Council, the King's Bench, and the Chancery during vacation." While Council did not welcome

---

* *Select Cases in Chancery* (S.S.) xvii.
† *Cal. Proc. in Chancery*, I, xciv.

judicial work, the Chancellor was always ready, and—unlike the common law writ—a petition cost nothing to present.

But until the Tudors, the composition of the court varies. In 1377 * the Chancellor alone dismisses a bill, also in 1407–1409.† In 1498‡ Chancellor and Council are sitting together, and through the reigns of Henry VI and Edward IV, he is found either sitting alone, or with the councillors, or with common law judges. It is doubtful whether he habitually sat alone in a judicial capacity before Wolsey's time.

Equity.

The Chancellor did not invent equity. Equity was inherent in the Royal extraordinary powers. The king's oath was to do justice and mercy, "the king's face should shew grace," and at the last the subject has the right to petition. These petitions or Bills are found in many places, in the Exchequer, the Eyre, Parliament, Council, and Admiralty, and sometimes in the two Benches. The Bill in Eyre has already been mentioned. It has the same ancestor as the Bill in Chancery. Equity was not unknown to the Common Law Courts. And the earliest cases of specific performance § and feoffment to uses ‖ (1366–1423) are in Council.

The Chancery as thus constituted was the final court of the law merchant,¶ and the law ecclesiastical: ** to it came the petitioner who said either that his adversary was too strong for the law, or that the law knew no remedy for the complaint. All manner of topics come up, and no distinction is at first made between civil wrong and crime.†† Moreover, various statutes

---

* *Select Cases in Chancery*, No. 106 (S.S.).
† *Ibid.* No. 107. ‡ *Ibid.* No. 95.
§ Cal. Cl. Rolls, 40 Edw. III, 237.
‖ Rot. Parl. iii. 79; Nic. iii. 20.
¶ *Infra*, p. 171. ** Hargrave, *Law Tracts*, 312.

†† The following cases, taken mainly from the Calendars of the Proceedings in Chancery (*temp.* Richard II—Elizabeth), show the variety of the complaints which came before the Chancellor.

Kymberley v. *Goldsmith.* Bill for non-delivery to plaintiff, "to his importable losse and hindryng," of a ton of woad which defendant had sold him and which had been paid for in wool. (*Cal.* i. 20.)

A petition from your "poor orator William de Egremont, parson of Workington," *temp.* Henry IV, alleging that one Richard Goldsmith did horribly assault him in church, and imprisoned his servants till he paid £10 as ransom. That our Lord the King had sent writs, but only with the result of making him "more malicious and horrible than ever"; and that he

delegated to the Chancellor parts of the jurisdiction exercised by the Council, *e.g.* to issue a *Capias* to the sheriff for the arrest of those who commit felonies and flee into an unknown place, and if that fails a writ of proclamation.*

When Council left the civil field to the Chancellor, he became active. Beginning with the feoffee to uses, he dealt with the feoffees heir, and with the alienee with notice, though he held that the purchaser of the legal estate without notice might retain the land for his own benefit. He also gave relief, against fraud, mistake, accident (particularly the accidental loss of a document), breach of confidence, duress, and inequitable dealing generally.

The Procedure.

The procedure in the Chancery was that of the Council. At common law neither the parties to an action nor other interested persons were competent witnesses till 1851 † and 1843 ‡ respectively. The Chancellor assuming that the defendant knew better than most what he himself has done, ordered him to answer the "bill" on oath and sentence by sentence, to disclose any documents in his possession, and if he disobeyed sent him to prison. If satisfied, he could make an order for specific performance or for the defendant to do what he thought just. Disobedience meant imprisonment.

He used the same writs as Council :

(1) The *subpœna* to the defendant either under the Great or Privy Seal.

---

subsequently attempted to murder plaintiff on the highway, and still threatens him, so that he durst not abide in the country or live in his parsonage (prayer for subpœna, and that the defendant find sufficient surety of the peace). (*Select Cases in Chancery*, No. 52.)

Hodges v. *Harry*, *temp.* Henry VI. Petition to Chancery to restrain defendant by oath from using the "sotill craftys of enchantement wychecraft and sorcerye," whereby "he brake his legge and foul was hert." (*Cal.* i. xxiv.)

Godard v. *William Ridmynton*, probably *temp.* Henry V. Bill addressed to the Master of the Rolls, complaining that defendant had ravished his servant maid, and beseeching the Master of the Rolls to "tenderly consider the premissis and thereupon to set due correction." (*Cal.* i. lix.)

John Staverne v. *John Bonynton.* Petition to the Chancellor for a writ of subpœna to be directed to a witness to come and give evidence, and "to declare the treweth in the matiers foresaide." (*Cal.* i. xix.)

* 2 Hen. V, s. 1, c. 9.

† 14 & 15 Vict. c. 99. ‡ 6 & 7 Vict. c. 85.

(2) The *venire facias* to the sheriff, if the efficacy of the subpœna was doubted "venire facias coram nobis in cancellaria nostra."

(3) The *corpus cum causa* * to the defendant, if any one complained that he was wrongfully imprisoned.

It will be observed that the subpœna (see *antea*) summons the defendant to come and "answer what should then be objected to him," and thus was quite elastic.

The form of these writs does not vary much from the Subpœna and Habeas Corpus of to-day.

In the reign of Henry VI we find the origin of the equitable system of granting Injunctions. There was a case † in which the plaintiff had given a bond in payment of certain debts he had purchased. He then, on finding that he could not bring an action to recover the debts in his own name, filed a bill before the Lord Chancellor Waynflete to be relieved from his bond. The case being adjourned into the Exchequer Chamber, the judges held that the bond being without consideration it should be cancelled by decree which the Chancellor accordingly pronounced. An action nevertheless was brought in the Common Pleas on the bond, and succeeded, the Court holding that the Chancellor could indeed imprison the contumacious party by way of enforcing his decrees, but that the party could still sue on his legal right in a court of law. To remedy this the Chancellor then introduced the *injunction*, by which he forbad the plaintiff to proceed, or, if he had obtained judgment, to execute it. This was a fruitful source of difference between Chancery and Common Law, which remained open till the famous battle between Coke and Ellesmere.

In the Year Book 22 Edw. IV, 21, we have a premonition of variance. The Chancellor granted an injunction after a verdict in the King's Bench, on the ground that the verdict had been obtained by fraud. The Lord Chief Justice asked the plaintiff's counsel if they would not pray judgment, to which they said they were afraid of the injunction. The Lord Chief Justice said no

---

* "Ricardus, Vicec. London, sal. Præcipimus vobis firmiter iniungentes quod omnibus aliis prætermissis et excusatione quacunque penitus cessante, habeatis coram nobis in Cancellaria nostra die lune proximo futuro ubicunque tunc fuerit Iohonnem Milner de Takely in Comitatu Essex per vos in prisona nostra de Neugate sub aresto detentum ut dicitur unacum causa arestacionis et detencionis suæ. Et hoc sub incumbenti periculo nullatenus omittas hoc breve vobiscum deferentes. T. meipso." (*Select Cases in Chancery*, No. 8.)

† Year Book, 36 Hen. VI, 13.

harm could come to them except imprisonment, and if that happened "apply to us for a *Habeas Corpus*, and we will discharge you." The matter was apparently amicably arranged, and indeed at this period the relations between the Chancellor and the judges were close and friendly. He often consulted them, they often sat with him; some writs ran "per curiam cancellariæ et omnes iustitiarios," or "per decretum cancellarii ex assensu omnium iustitiariorum." The judges recognised the peculiar attributes of Chancery, and the occasions when resort might properly be made to that court. On the other hand, where a man had a remedy at common law he should not have a remedy in Chancery.

The Common Law Courts and Injunctions.—In Elizabeth's reign the common law judges rebelled against the Chancellor's interference by injunction. The Chancellor took the position that his jurisdiction did not affect to impeach the common law judgments; but admitting their validity merely relieved upon equitable considerations arising thereon. The judges retorted that though the Chancellor did not assume to examine their judgments, yet by his decrees he took away their effect.

By 27 Eliz. c. 1, it was made a *præmunire* to apply to other jurisdictions to impeach or impede the execution of judgments given in the King's Courts; and in the thirty-first year of Elizabeth a counsellor at law was indicted in the King's Bench for exhibiting a bill in Chancery after judgment had gone against his client in the King's Bench.*

The Court of Chancery, however, pursued its way undisturbed. It had experienced some difficulty in enforcing its decrees. The original process had been by subpœna attaching the person. The Chancellors, not finding this entirely efficacious, invented (1) the *commission of rebellion*, on which their officers proceeded to break open houses in execution of the decree and arrest the party as a rebel, and (2) the *commission of sequestration* to sequester the party's lands. The judges disliked this last commission extremely, and went so far as to say that if the sequestrator were resisted or killed it would be only *homicide se defendendo*.

In 1616 matters came to a head in the great battle between Coke and Lord Ellesmere on the subject of injunctions. In a case in which, tried before Coke, a verdict had been obtained by a gross fraud, the Chancellor perpetually enjoined the successful

* Crompt. 57–58.

party from proceeding to execute his judgment. The verdict had been gained by decoying away a necessary witness of the defendant and making the judge believe he was dying. The witness was taken to a tavern, and a bottle of sack ordered for him : as soon as he put it to his mouth the emissary went back to court, and when the witness was called the emissary swore that " he had just left the witness in such a state that if he were to continue in it a quarter of an hour longer he would be a dead man." The Chancellor on learning this granted an injunction.

Indictments were then preferred against everybody, suitors, solicitors, and counsel, for a *præmunire* for questioning in equity a judgment obtained in the King's Bench.

The king, after taking advice with the great law officers, supported the Chancellor not merely on the grounds that they gave him,* but added something about it being part of his " princely office " and suitable for his " princely wisdom " to determine disputes between his several courts.

From that time down to the Judicature Acts the power of the Court of Chancery to issue injunctions was not seriously disputed.†

Equity and the Common Law.—The strength of the jurisdiction of the Court of Chancery lay in the writ of subpœna commanding the defendant to appear, and the subsequent process against the person if its decree was disregarded. Without too roughly wounding the susceptibilities of the common law judges by acting directly against them, it obtained a virtual control over their courts by ordering a suitor, on the application of the person interested, to refrain or desist from enforcing his legal rights on pain of imprisonment. By this means it obtained a practically exclusive jurisdiction over such matters as mortgages and trusts, in which it took a different view of the rights of parties from the courts of common law. It ordered the cancellation of documents obtained by fraud, a thing the common law could not do. It also obtained a jurisdiction over the restraining of wrongs, the winding-up of partnerships and the taking of accounts, which the courts of common law neglected to assume. Such indeed was the slowness and want of elasticity of the common law that had it not been for

---

* The law officers gave as their opinion " that the Chancery is a court of ordinary justice for matters of equity, and the statute meant only to restrain extraordinary commissions and such like proceedings."

† See *Hoare* v. *Bremridge*, L. R. 14 Eq. 522.

the genius of Lord Mansfield the mercantile law of this country would have found its way into the Courts of Equity.

Though at one time the Chancellor's equity was open to the reproach of Selden that it varied with the length of the Chancellor's foot, it gradually became systematised; rules grew up because precedents were followed. Several Chancellors, such as Lord Nottingham and Lord Eldon, have gained fame on the ground that they powerfully contributed to this result, but justice cannot be done to them here.

The Master of the Rolls.

As the business of the court grew, the staff increased. The Chancellor had been assisted by a staff of clerks, who, amongst other titles, were called "magistri cancellarii," and that name stuck. They were appointed by the Chancellor, except the chief master, who was called Master of the Rolls and appointed by the Crown.* They helped him in his judicial work, and he frequently delegated to them parts of the case for inquiry and report. But the Master of the Rolls became pre-eminent. In 1433, during the absence of the Chancellor in France, he was commissioned to exercise the jurisdiction of the Court of Chancery. He is sometimes called Vice-Chancellor. And repeated commissions to hear cases, at first special and then general, marked him as different from the other masters, and finally as the Chancellor's deputy general. In 1729 an Act made gave him a judge of first instance, subject to an appeal to the Chancellor, and such he remained till the Judicature Act.

By 53 Geo. III, c. 24 (1813), the Crown was authorised to appoint a Vice-Chancellor to help the Lord Chancellor.

By 5 Vict. c. 5 (1842) two more Vice-Chancellors were appointed, on the occasion when the equitable jurisdiction of the Court of Exchequer was taken away.

In 1851 were created two Lords Justices of Appeal in Chancery, who together with the Lord Chancellor if he chose to sit, should form the Court of Appeal in Chancery.†

From that court appeal lay to the House of Lords.‡

---

* In 20 Edw. II, William de Armyn was made Master of the Rolls to relieve the Chancellor of the custody of the records.

† 14 & 15 Vict. c. 80. ‡ *Ibid.* § 10.

CHAPTER XIII

THE COURT OF REQUESTS

Its Origin.—The origin of this court is attributed by Palgrave and Spence to the order of 13 Rich. II regulating the procedure of the Council, which said that the Lord Privy Seal, together with such of the Council as were then present, should expedite (*exploiter*) the bills of the lesser folk, and hence Palgrave deduces the claim of Lord Privy Seal to preside in the Court of Requests. There seems, however, no authority for saying that the Court of Requests dated from that period. The learned editor of the *Select Cases in the Court of Requests*,* states that he first finds the name "Court of Requests" in 1529; and in the sentence which he quotes, "Hereafter folowe the names of such Counsaillours as be appoynted for the heryng of power mennes causes in the Kynges Courte of Requestes," he points out that stress is laid on the fact that the judges are Councillors.

Its Connexion with the Council.—The order of Richard II made a Committee of Council, and the true view would appear to be that for a long time the court was either a delegation or an aspect of the Council, similar in character to the early position of the Court of Chancery and the Star Chamber, and deriving its authority from that fact.

Henry VII made it a definite tribunal, and nominated the members, thus turning into a permanent or standing committee what had before been a haphazard meeting of councillors. But even then its intimate connexion with the Council and the Star Chamber is attested by the list of Sir Julius Cæsar,† which shows that all the judges in the Star Chamber, from the ninth year of Henry VII down to the third and fourth of Philip and Mary, sat

---

* Edited for the Selden Society by I. S. Leadam, xiv.

† *Select Cases in Court of Requests*, cvi, cviii.

alternis vicibus in the King's Court at Whitehall, commonly called the Court of Requests, or wherever the king held his council, for the hearing of private causes between party and party. The Lord Privy Seal had also a seat in the Star Chamber.

Wolsey placed the Court of Requests permanently in Whitehall, for the expedition of poor men's causes (1515–1519). Till then, this "Court," as it was called, "of Poor Men's Causes," attended the royal person on the royal progresses, and it is not till about 1497 that its books indicate that any difference is made between term and vacation. Mr. Leadam pertinently remarks that this discrimination, when it was made, indicates that a professional element was getting control of the court. Suppliants to the court alleged usually, either that they were too poor to sue at common law or that they were king's servants attending the royal person. When the professional element first appeared in the court it is hard to say, but at the end of the reign of Henry VIII "the court was composed of professional lawyers, civilians, and canonists, and the judges were styled Masters of Requests." *

Since the accession of Henry VII the court had never been idle; in especial, it had taken the part of copyholders who were suffering under the enclosures of their lords. When the dissolution of the monasteries had given estates to needy courtiers, and rising prices made land more valuable, the tenantry were forced to invoke assistance in increasing numbers, and the legal element in the court became more prominent. Two permanent judges, "Masters of Requests Ordinary," "began towards the end of Henry VIII's reign to control the work of the court." † Elizabeth, being much in love with royal progresses, required the old machinery to deal with such petitions of justice and grace as were presented to her *en route*. Two Masters of Requests Extraordinary were then appointed to reinforce the court, and this set free two to accompany her.

After the accession of James I, four Masters in Ordinary were appointed, but as the volume of business became very heavy, and as the king still went on progresses, there were great complaints of the irregularity of the sittings and the delays which naturally resulted.

Its Functions.—The functions that the court during this period discharged were analogous to those of the Council, at any

---

* *Select Cases in Court of Requests*, xvi. † *Ibid.* xix.

rate prior to the reign of Henry VII. There is this difference, that the Court of Requests entertained only civil business, but both are alike in this, that they offered relief to those who either from disadvantages personal to themselves or from the rigidity of the common law were unable to get justice. Here was the poor man's court of equity, and it is beyond question that it attracted an abundant amount of business.

Hostility of the Common Law Courts.—Its jurisdiction was, however, to be seriously attacked. So long as it was incontestably a committee of the Council, its position was as impregnable as that of the Star Chamber. But when the councillors disappeared from the board and the purely professional element remained, it was vigorously asserted by the common law courts that here was, in effect, a new commission which the crown could not grant, and that if a suitor desired equity there was the Court of Chancery open to him.

It was doubtless the truth that however theoretically perfect the legal succession, practically this court could not, as now constituted, claim the support of immemorial custom. The Privy Council, that is the active members of the Council, had become a distinct body : Privy Councillors sat in the Star Chamber, they did not sit in the Court of Requests ; the Star Chamber had in addition some statutory authority, the Court of Requests had none.

At any rate, in 1590, according to the authorities, the attack commenced. The Common Pleas, speedily reinforced by the Queen's Bench, commenced to issue prohibitions to plaintiffs in the Requests, issued writs of habeas corpus in favour of persons imprisoned by the Requests for contempt, and in *Stepney's case* (40 & 41 Eliz. 1598) it was adjudged, according to Coke,* that the Requests was no court that had power of judicature, but that all proceedings there were *coram non iudice*, and that an arrest under a warrant of Privy Seal was false imprisonment.

When we remember Sir Edward Coke's furious indignation against the injunctions of the Court of Chancery, it is not surprising that he threw the weight of his authority against the Requests. The year after he became Chief Justice of the Common Pleas all the judges agreed that a perjury in the Court of Requests was not punishable, " for it is but a vain and idle oath and not a corrupt

---

* *Inst.* iv. 9, fol. 97.

oath, because the Court of Requests have nothing to do with nor can examine titles of land." *Quod nota*, adds the reporter.*

Its Disappearance.—It has been generally accepted, on the authority of Spence and Palgrave, that the Requests never survived the blow they received in the forty-first year of Elizabeth. Now that Mr. Leadam's book is published it is impossible to hold that view. Blackstone † said that the court was "virtually abolished" by 16 Car. I, c. 100 (1640), commonly known as the Act aimed against the Star Chamber and the courts of cognate derivation. "Virtually," for the court is not mentioned in the Act, and as a fact continued without apparently any challenge. Between April 28 and May 17, 1642, Mr. Leadam has counted in its books of orders and decrees 556 orders made! In August of that year the Civil War broke out, the Privy Seal was withdrawn, the legal machinery lost, and the court died a natural death.

---

* Yelverton, 3rd ed. 111. † *Comm.* iii. 51.

CHAPTER XIV

THE COURT OF ADMIRALTY

Its Origin.—The history of the jurisdiction of this court is, says Bishop Stubbs, "as yet obscure." Prynne * asserts that there was an Admiralty Court with civil and criminal jurisdiction *temp.* Henry I, which dated from Saxon times, but his authority is the Black Book of the Admiralty, which is now supposed by the best authorities † to have been written in the fifteenth century, and of which the matter is not earlier than the fourteenth century, the references to the times of Henry I and John being considered apocryphal.

The Office of Admiral.—The title of Admiral does not occur much before the fourteenth century, and then in connexion with the French possessions of the English Crown. In the Vascon Roll, 23 Edw. I, we find mention of the appointment of an Admiral of "the Baion fleet"; in 1300, Gervase Alard was made Admiral of the fleet of the Cinque Ports, and this is the earliest known use of the title in England. The word itself was employed in the Mediterranean navies, and is believed to have come from the east by way of Genoa.

Admiralty Courts.—The Admiralty Courts appear somewhere between 1340 and 1357, in consequence, it is said, of the difficulties experienced by us in dealing with piracy or "spoil" claims by or against foreign sovereigns. Before 1340 there was a constant correspondence between ourselves and foreign kings on this topic, and on the alleged inability of injured persons to obtain justice. Our courts of common law when the plaintiff was a foreigner seem to have given no redress.

The matter was brought prominently before the notice of

---

* *Animadversions*, 106.

† *Select Pleas in the Court of Admiralty* (Selden Society), Introd.

Edward III when he had to pay out of his own pocket damages for outrages committed on his allies the Genoese by his own subjects. In 1340 the battle of Sluys, which gave him maritime supremacy and allowed him to assert his claim to be sovereign of the seas, offered him the opportunity of founding an Admiralty Court to keep the king's peace thereon.

Connexion of the Council with Admiralty Affairs.—Down to the early part of Edward III's reign, Admiralty matters came either before the common law courts, the Chancellor, or the Council (there is one case before the Council in 1352); piracy, reprisals, and letters of marque were considered specially within the purview of the Chancellor and to be "the most noble and eminent piece of his jurisdiction." (Hale.)

At the same time there were several maritime towns, *e.g.* Ipswich and Padstow, which had from a very early period "Courts of the Seaport," which administered the law maritime. Between these courts and the Admiral's Court there arose disputes as to jurisdiction, and in consequence two statutes* were passed defining and restricting the jurisdiction of the Admiral, while at the same time the crown granted charters of exemption to various towns from the Admiral's authority, and in some cases, such as Yarmouth, Dartmouth, and Rochester, express grants of Admiralty jurisdiction were made to the town.

We are able from the records published by the Selden Society to see what the Admiralty Courts were doing before the statute of Richard II was passed in 1389.

In 1353 a case as to ownership of goods recaptured from pirates was tried before the Admiral and Council.

In 1357 there is an answer to the King of Portugal about some Portuguese goods which had been taken by the English from a French ship which had "spoiled" a Portuguese vessel. Edward III says that the admiral had decided that the goods were good prize.

A Judicial Commission.—In 1360 John Pavely is made captain of the fleet, *with power to hold pleas* (querelæ). This is the first instance of such a commission. In the same year Beauchamp is given the command of the fleets of the north, south, and west, with grants of maritime jurisdiction.

In 1361 a commission to Sir R. Herle to try a case of piracy and murder *according to the common law*, was recalled on the advice

---

* 13 Rich. II, st. 1, c. 5 and 15 Rich. II, st. 2, c. 3.

of the Council, on the ground that by common law felonies, trespasses, and injuries done on the seas, should be tried by the admiral by the *law maritime*.

Exclusive Jurisdiction of the Admiralty.—The theory of the common lawyers was that all matters arising outside the jurisdiction of the common law, *i.e.* outside the body of a county, were inside the jurisdiction of the Admiralty.* "That this court had originally cognisance of all transactions civil and criminal, upon the high seas, in which its own subjects were concerned, is no subject of controversy" (per Lord Stowell in *The Hercules*).† And in fact, criminal cases even of the degree of capital were habitually tried in the Admiralty, sometimes without a jury, down to the time of Henry's statute. Piracy, we may notice, was seemingly not a common law felony, for in 1429 Parliament petitions that it may be made so, and gets for an answer, *Le Roi s'avisera*.

The precedents in the Black Book of the Admiralty show that the business of the court during the fourteenth and fifteenth centuries consisted of criminal, mercantile, and shipping cases.

The First Patent.

The First Patent for a Judge of the Court.—In 1482 we have the first patent appointing a judge of the Admiralty Court, to hear cases "de iis quæ ad curiam principalem Admirallitatis nostræ pertinent."‡

In 1509–1519 Henry on his accession made treaties with France providing for special tribunals to try piracy claims with dispatch. In England, the Earl of Surrey the Lord High Admiral, Cuthbert Tunstall, M.R., and Christopher Middleton, judge of the Admiralty, were appointed judges. Judgment was to be given on the merits "sine strepitu et figura iudicii sola facti veritate inspecta." No appeal was allowed, except to the Council on bail.

Till that reign the Court of Admiralty exercised both civil and criminal jurisdiction in virtue of the royal prerogative. It was nearly connected with the Council, and it was independent of the common law.

The Victory of the Common Law.

Henry VIII's Settlement: Victory of the Common Lawyers.—The Statute 28 Hen. VIII, c. 15, recites that people com-

---

* 4 *Inst.* 134–5. † 2 Dod. 371.

‡ Pat. 22 Edw. IV, pt. 1, m. 2.

mitting offences on the sea often escape punishment, because it is hard to get witnesses, if the prisoners will not confess, which they will not do without torture. Accordingly all treasons, felonies, robberies, murders, and confederacies committed within the Admiralty jurisdiction shall be judged according to the Common Law, before the Admiral or his deputy, and three or four other substantial persons appointed by the king.

As a fact these "substantial persons" were always common law judges, who thus gained the control of this mixed commission.

Recent Legislation.—Then came some very intricate legislation, which produced the result that all crimes committed at sea can be tried before any court in England if otherwise competent, or before any Supreme Court in a colony, or any High Court in India.

By the Central Criminal Court Act* that court was empowered to try all offences committed within the Admiralty jurisdiction.

By 7 & 8 Vict. c. 2 (1844), all Commissioners of Oyer and Terminer or Gaol Delivery have all the powers which the commissioners under the Act of Henry VIII would have had. The Consolidation Act of 1861 is to the same effect.

Besides these statutes, the Merchant Shipping Acts make similar provision for the punishment of crimes committed at sea.

Admiralty jurisdiction begins below low-water mark, such being not within the body of any county, and when the tide is in, below high-water mark.

The Three-Mile Limit.—In the case of *The Queen* v. *Keyn*,† the majority of the judges held that the Admiral's jurisdiction does not extend over a crime committed *by a foreigner on board a foreign ship* within three miles of the coast. This was amended by the Territorial Waters Jurisdiction Act, 1878, but it was provided that proceedings in such a case shall not be instituted without the consent and certificate of a Secretary of State.

Civil Jurisdiction.

Civil Jurisdiction.—With regard to the *civil* jurisdiction of the Admiralty, the common law courts never attempted to prohibit the Court of Admiralty in relation to *wrongs* committed on

---

* 3 & 4 Will. IV, c. 36.

† L. R., 2 Ex. D. 63.

the high seas. But the jurisdiction with regard to contracts was bitterly contested.

By Statute 32 Hen. VIII, c. 14, the Admiralty got jurisdiction to try cases on contracts made abroad, bills of exchange, charter parties, insurance, average, freight, non-delivery of cargo, damage to cargo, negligent navigation, and breach of warranty of seaworthiness.

By his letters patent the king conferred wide jurisdiction, "statutis in contrariam non obstantibus," previous patents having always been limited agreeably to the statutes of Richard II. The letters patent of 1547 include "any thing, matter, or cause whatsoever, done or to be done as well upon the sea as upon sweet waters and rivers, from the first bridges to the sea, throughout our realms of England or Ireland or the dominions of the same."

Common Law Encroachments.

Jealousy of the Common Law Courts.—About 1570 we find the Admiralty complaining that the common law courts are encroaching.* The Queen then wrote to the mayor and sheriffs of London that this is "very strange," and tells them not to do so. But the complaints still go on, and, in 1575, a special commission issues to the Admiralty, empowering it to hear cases on charter parties, bills of lading, bills of exchange, insurance, freight, bottomry, necessaries for ships, and contracts binding ships, others being prohibited from taking cognisance of such pleas.

A "Concordat."—Shortly after this, it is said that the Admiralty Court and the common law judges came to an agreement as to the limits of their jurisdictions; but the rivalry continued.

The Common Law and Admiralty Jurisdictions mutually exclusive.—The common law gave no remedy in cases of contracts made or torts committed abroad. The Admiralty jurisdiction was taken to supply this deficiency, but not to apply within the body of a county. The common law watched the proceedings of the Admiralty with great attention and issued prohibitions without mercy. The Admiralty vainly asserted its jurisdiction over claims for necessaries and materials supplied to ships or over charter parties. Unless the contract was actually made, or the

* For an instance of the Q. B. being rebuked for prohibiting the Admiralty, see Dasent, xv, N. S. 314 (1587).

goods actually supplied on the high sea, the prohibition went, for the Admiralty was not a court of record.

The Fiction of the Common Lawyers.—Blackstone * writes, "it is no uncommon thing for a plaintiff to feign that a contract really made at sea was made at the Royal Exchange or other inland place, in order to draw the cognisance of the suit from the Court of Admiralty to those of Westminster Hall."

The Admiralty jurisdiction over contract thus gradually fell into disuse, and the same fate befell it in respect of torts of a "transitory" description.

Legislation.

Legislation.—In consequence of the great inconvenience caused to parties by this state of affairs, in 1840 the first Admiralty Court Acts were passed,† which increased the jurisdiction of the court, and gave it power to enforce its decrees. In 1854, the Merchant Shipping Act, and the Second Admiralty Court Act,‡ increased its procedural efficiency, and its powers with respect to cases of wages and salvage.

In 1861, the third Admiralty Court Act § gave it almost all the jurisdiction it asked, except in cases of charter parties, viz. over claims for building, equipping, and repairing ships, claims for necessaries supplied to ships, claims for damages to cargo imported, claims for damages done by ships, questions touching ownership, claims for wages and disbursements by masters, and in respect of registered mortgages.

The jurisdiction conferred by the Act might be exercised either by proceedings *in rem* or *in personam*.

After the third Admiralty Court Act was passed, the advantages of speedy administration of justice were so obvious that the jurisdiction was delegated in the smaller cases to the county courts around the coast, by the County Courts Admiralty Jurisdiction Act, 1868, the operation of which was extended by another statute passed the next year.

Old Maritime Courts Abolished.—The old local maritime courts had been abolished by the Municipal Corporation Act, 1835,‖ the Cinque Ports Admiralty Court alone surviving.

---

* *Comm.* iii. 106.
† 3 & 4 Vict. cc. 65 and 66.
‡ 17 & 18 Vict. c. 78, 104.
§ 24 & 25 Vict. c. 10.
‖ 5 & 6 Will. IV, c. 76.

Admiralty Appeals.—Appeals from the Admiral went in the fifteenth century to delegates appointed by the Crown, or special commissioners *ad hoc*. In 1534 * commissioners called Delegates of Appeals were appointed to hear appeals from the ecclesiastical and Admiralty Courts. Their powers were by 2 & 3 Will. IV, c. 92, transferred to the King in Council ; and by 3 & 4 Will. IV, c. 41, the Judicial Committee of the Privy Council was formed to take all appeals which may be brought before the King in Council.

Merger in the High Court of Justice.—By the Judicature Act of 1873, the Court of Admiralty † was merged in the High Court of Justice, and so indirectly obtained jurisdiction over all maritime causes, though limited as to its jurisdiction *in rem* to those causes as to which its jurisdiction was either original or given by statute. Appeals lie to the Court of Appeal and thence to the House of Lords.

---

* 25 Hen. VIII, c. 19.

† 20 & 21 Vict. c. 85, it was provided that the judge of the newly-established Court of Probate might also be the judge of the Admiralty Court at the next vacancy.

CHAPTER XV

THE JUDICATURE ACTS

A STATE of things in which the Courts of Chancery, Common Law, Admiralty, Probate, and Divorce administered different systems of law, recognised different principles, and used different procedure, had during the nineteenth century been considered by various Royal Commissions which had cleared away many abuses and made some advance toward simplification.

The Act of 1873.—But after the report of the Judicature Commission of 1860 Parliament passed the Judicature Act of 1873 * which, after being deferred for a year, came into operation on November 1, 1875. By this Act the whole judicial system of this country was remodelled.

The Changes made.—At the time that the Act was passed the Common Law, as we have seen, was administered in the Courts of Queen's Bench, Common Pleas, and Exchequer, each with a staff of a Chief and his puisnes. From these courts lay appeal to the Court of Exchequer Chamber (Cam. Scacc.), and thence to the House of Lords.

The equitable jurisdiction of the Court of Chancery was exercised by the Lord Chancellor, the Master of the Rolls, and three Vice-Chancellors sitting as judges of first instance. The Lords Justices sat with the Lord Chancellor as a Court of Appeal, and from them appeal lay to the House of Lords.

The testamentary and matrimonial business which was originally taken by the Prerogative Courts of Canterbury and York, was in 1857 handed over to two new courts, the Court of Probate and the Court for Divorce and Matrimonial Causes. The Court of Probate was presided over by a single judge, who was to be the judge of the Court of Admiralty on the next vacancy.

---

* 36 & 37 Vict. c. 66.

Appeal from this court lay to the House of Lords.* The Court for Divorce and Matrimonial Causes † was formed of the Lord Chancellor, the three Chiefs, and the Senior Puisne Judge in each Common Law Court, and the Judge of the Court of Probate, who was appointed the "Judge Ordinary" of the court. From the Judge Ordinary appeal lay to the full court, and from that in petitions for the dissolution of marriage to the House of Lords.

To this new court was given the new power of decreeing dissolution of marriage, which till then could only be effected by Act of Parliament.

By the Act of 1873 and the Acts modifying or supplementing it all these courts were united and consolidated together and constituted one Supreme Court of Judicature in England (§ 3).

The Supreme Court.

This Supreme Court consists of two permanent divisions, His Majesty's High Court of Justice, and His Majesty's Court of Appeal (§ 4).

The High Court of Justice.

All the existing judges of the Courts of Chancery, Common Law, Probate, Admiralty, and Divorce, were to be judges of the High Court. The Lord Chancellor and the Master of the Rolls were afterwards excepted. The jurisdiction of the court thus constituted includes all the jurisdiction of all the courts thus consolidated, together with the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, Commissioners of Assize, Oyer and Terminer, and Gaol Delivery, subject to certain specified exceptions.

All these judges have (except as otherwise provided) equal power, authority, and jurisdiction.

The Divisions of the High Court.—By § 31 the High Court of Justice was divided into five divisions :

(1) The Chancery Division, consisting of the Lord Chancellor, the Master of the Rolls, and the Vice-Chancellors.

(2) The Queen's Bench Division, consisting of the Lord Chief Justice and the puisnes of the Queen's Bench.

(3) The Common Pleas Division, consisting of the Lord Chief Justice and the puisnes of the Common Pleas.

---

* 20 & 21 Vict. c. 77, § 39. † 20 & 21 Vict. c. 85.

(4) The Exchequer Division, consisting of the Lord Chief Baron and the Barons of the Exchequer.

(5) The Probate, Divorce, and Admiralty Division, consisting of the existing judges of the Probate Court and Admiralty.

By § 32 the Crown was authorised by Order in Council to alter these divisions and abolish on a vacancy any of the following offices, viz. of Lord Chief Justice of England, Master of the Rolls, Lord Chief Justice of the Common Pleas, and Lord Chief Baron of the Exchequer.

Consolidation of the Common Law Divisions.—By Order in Council, December 16, 1880, the offices of Chief Justice of the Common Pleas and Chief Baron were accordingly abolished, and the Divisions of Common Pleas and Exchequer were merged in the Queen's, now the King's Bench Division.

By § 34 certain business is assigned (subject to modification by Rules of Court) to particular divisions. Thus to the Chancery Division are assigned, *inter alia*, causes and matters for the following purposes—administration of the estates of deceased persons, dissolution of partnerships and taking accounts, redemption and foreclosure of mortgages, the execution of trusts, the rectification and setting aside of deeds or other written instruments, specific performance connected with sales of realty, wardship, and care of infants' estates.

To the King's Bench Division is assigned by recent statute * the duties of the Court of Criminal Appeal, which consists of the Lord Chief Justice of England and eight judges of the King's Bench Division, an uneven number not less than three forming a quorum. The judgment is given by the presiding judge or his nominee, unless it be a question of law, and the court think it desirable that separate judgments should be given. An appeal lies to the House of Lords on the Certificate of the Attorney-General.

A convicted person may appeal under certain conditions on questions of both law and fact. The court has wide powers, and may substitute a sentence, either more or less severe, but if it allows an appeal, it must direct a judgment and verdict of acquittal.

The Judge on Circuit.—The jurisdiction of a judge on circuit who carries the King's Commission is not limited by the terms of his Commission ; he is deemed to constitute a court of the High Court of Justice.†

---

* 7 Edw. VII, c. 23.

† Judicature Act, 1873, § 29.

The Court of Appeal.

The Court of Appeal consists ordinarily of the Master of the Rolls and five Lords Justices of Appeal.* There are certain *ex officio* members, viz. the Lord Chancellor, the Lord Chief Justice, the President of the Probate, Divorce, and Admiralty Division, and any ex-Lord Chancellor or Lord of Appeal in Ordinary, who on the request of the Lord Chancellor consents to act.† The Lord Chancellor may request any judge of the High Court to sit as an additional judge of the Court of Appeal, and such judge shall thereupon attend.‡

The new Court of Appeal was given the powers and jurisdiction of the Lord Chancellor and the Lords Justices in equity, of the Exchequer Chamber in common law, and of the Privy Council in Admiralty and Lunacy appeals.

Any barrister of not less than ten years' standing is qualified to be appointed a judge of the High Court or a Lord Justice of Appeal.

The judges hold office for life, subject to a power of removal by the Sovereign on an address presented to him by both Houses of Parliament. No judge can sit in the House of Commons (§ 9).

Law and Equity are to be concurrently administered in every court by every judge. Claims, defences, and relief, equitable estates, titles, rights, and all equitable duties and liabilities appearing incidentally are to be recognised in the same manner as the Court of Chancery would have recognised them prior to the passing of the Act.

Assimilation of Principles and Practice.—The Act, after directing that in certain specified cases—as, for instance, of assignment of choses in action, equitable waste, merger, and stipulations not of the essence of the contract—the old rule of the common law was to be altered, for the rule of equity lays down the general principle that wherever there is any conflict or variance between the rules of equity and those of the common law with reference to the same matter, the rules of equity shall prevail.

The Act not only affected principle but practice. Remedies once peculiar to some particular court can now be given in any Division. Thus, that practice and procedure of which the

---

* 36 & 37 Vict. c. 66 ; 44 & 45 Vict. c. 68 (1881).
† 54 & 55 Vict. c. 53 ; 3 & 4 Geo. V, c. 21.
‡ 8 Edw. VII, c. 51.

benefit could once only be got by the plaintiff bringing a bill in Chancery, is made available by interlocutory applications in all the Divisions of the High Court. The Courts of Common Law, for instance, could give no relief against threatened injury. The Courts of Equity both could and did. Now, all courts can issue Injunctions. So with the remedy of Specific Performance. On the other hand, till Lord Cairns' Act* the Courts of Chancery were, except in certain cases, unable to give damages.

It does not, however, seem that by this Act the High Court can exercise powers not previously exercised by any court.†

Thus was brought about what has been called the "fusion of law and equity." Some would say that "supersession" would be a more accurate description of the process. Maitland, however, considered Equity as a loosely knit collection of appendixes to chapters of the Common Law, which are by statute now incorporated in the text.‡ But whatever the name, the development has progressed by stages which are normal and perfectly familiar to every student of Jurisprudence, viz. Law, Equity, and Legislation.

The House of Lords. The Act of 1876.

By the Appellate Jurisdiction Act, 1876,§ appeal lies to the House of Lords from the Court of Appeal in England, and from those Scotch and Irish Courts from which an appeal lay before the commencement of this Act by common law or statute.

There must be present at such an appeal not fewer than three of the following persons, designated as Lords of Appeal :

(1) The Lord Chancellor of Great Britain.

(2) The Lords of Appeal in Ordinary.

(3) Such Peers of Parliament as are holding or have held "high judicial office," as defined in the Act.‖

There are four Lords of Appeal in Ordinary ; to be eligible the person to be appointed by the Crown must have been for two years holding a "high judicial office" or a practising barrister

---

* The Chancery Amendment Act, 1858.

† *North London Railway Company* v. *Great Northern Railway*, 11 Q. B. D. 30.

‡ *Equity*, p. 18.

§ 39 & 40 Vict. c. 59. The Judicature Act, 1873, provided for the extinction of the appellate jurisdiction of the House of Lords and the Judicial Committee of the Privy Council, but this policy was abandoned on further consideration.

‖ See c. xiii, *ad fin.*

for not less than fifteen years. Such a Lord of Appeal is entitled to the style of Baron, and can sit and vote during his life.*

The Lords of Appeal, if Privy Councillors, are members of the Judicial Committee of the Privy Council, and it is their duty to sit and act as such, without prejudice, however, to their duties in the House of Lords (§ 6).

The hearing and determination of appeals may be proceeded with during prorogation, and even during dissolution if authorised by His Majesty by writing under the Sign Manual.

By § 4 the High Court is a Prize Court within the meaning of the Naval Prize Act, 1864 : subject to Rules of Court such jurisdiction shall be assigned to the Probate, Divorce, and Admiralty Division, and appeal lies to Her Majesty in Council as under the Naval Prize Act.

Again after eight centuries we see the Curia Regis, but it is the court at Temple Bar, and not that at St. James'.

---

* 50 & 51 Vict. c. 70.

CHAPTER XVI

THE COURTS OF THE COUNTIES PALATINE AND OF WALES

Grants of Counties Palatine.—The counties palatine were Chester, Durham, and Lancaster. Whatever may be the precise date at which these counties became "Palatine," it seems likely that there was in Saxon times a jurisdiction equivalent to that of the Palatine earl, and originating in usurpation and necessity. The Central Government was too far away both before and after the Conquest to control effectually the administration of the Marches, which were always turbulent and lawless districts.

The county palatine of Chester was granted by the Conqueror to his nephew, Hugh Lupus, and afterwards became one of the honours of the Prince of Wales.

The county palatine of Durham was granted to the Bishop of Durham by the same king.

The county palatine of Lancaster was granted in 1376 by Edward III to John of Gaunt, Duke of Lancaster, for his life, the duke to hold as freely as the Earl of Chester.

All these three grants were of full *iura regalia.*

"The power and authority of those that had counties palatine was kinglike, for they might pardon treasons, murders, felonies, and outlawries thereupon. They might also make justices of eyre, justices of assize, of gaol delivery, and of the peace. And all original and judicial writs, and all manner of indictments of treason and felony and the process thereupon, were made in the name of the person having such counties palatine. And in every writ and indictment within any county palatine, it was supposed to be *contra pacem* of him that had the county palatine." *

---

* Coke, *Inst.* iv. 204.

Their Absorption by Crown.—By 6 & 7 Will. IV, c. 19, the palatine jurisdiction of the Bishop of Durham was transferred to the Crown.

In 1461, the Duchy of Lancaster was permanently annexed to the Crown.

In 1535, 27 Hen. VIII, c. 24, provided that none but the king should have power to make any justice of assize, of the peace, or of gaol delivery, in any county palatine or other liberty, and that all writs and indictments should be in the king's name, and laid as against the king's peace.

The commissions, however, to the county of Lancaster should be under the king's usual seal of Lancaster, in manner and form as before (§ 5).

Thus the Durham and Lancashire Assizes and Quarter Sessions were assimilated to those held elsewhere, except that the Lancashire commissions were under a different seal.

Till 1830 Chester had a local chief justice and second justice, both appointed by the Crown. These offices were abolished,* and it was provided that the Assizes should be held in Chester and Wales as in other places, and that was the position at the time of passing the Judicature Act of 1873,† which enacted that the counties palatine of Lancaster and Durham shall respectively cease to be counties palatine as regards the issue of commissions of assize or other like commissions, but no further.‡

The Welsh Courts.—Of the courts in Wales it is perhaps sufficient to give a brief account.

When Robert Burnel drafted the great *Statutum Walliæ* § for Edward I, he produced a complete scheme showing the divisions of the country, the courts and the officers, sheriffs, and coroners, and the writs in actions.

Six counties, viz. Anglesea, Carnarvon, Merioneth, Flint, Carmarthen, and Cardigan, were provided with a justice, sheriffs, coroners, and courts on the English pattern.

The rest of Wales was divided into districts called "Lordships' Marchers," subject to the hereditary rule of Lords Marchers, who exercised despotic authority, and in which the king's writ did not run.

---

* 11 Geo. IV and 1 Will. IV, c. 70.
† 36 & 37 Vict. c. 66, § 99.
‡ The Court of the Chancery of Lancashire is still vigorous.
§ 12 Edw. I.

In 1536 and 1543 two statutes * were passed by Henry VIII abolishing the "Lordships' Marchers," and forming them into new counties, and establishing Welsh courts and judges quite separate from the English judicial system.

This arrangement lasted till 1830, when the statute † was passed (see above) abolishing the separate jurisdiction for the county palatine of Chester, and the Principality of Wales.

One additional judge was added to each of the Superior Courts of Westminster, and Wales was brought into the judicial system of England.

---

* 27 Hen. VIII, c. 26, and 34 & 35 Hen. VIII, c. 26.
† 11 Geo. IV and 1 Will. IV, c. 70.

CHAPTER XVII

THE CORONER

It is not certain when coroners were first appointed. Stubbs gave 1194 (5 Rich. I) as the date, on the authority of the twentieth article of the eyre of that year. The learned editor of the *Select Coroners' Rolls* * for the Selden Society finds evidence that they existed before that time.

It is generally supposed that he was designed to act as the royal check on the sheriff, there is no doubt that his business was to watch and preserve the royal perquisites, and there were many opportunities for exacting them.† The coroner kept the roll of local events to enable the justices to check the local presentments, he received and entered "appeals" of felony which would presently be tried by the "eyre," he kept record of outlawries, abjurations, sanctuary, etc. He held inquests in cases of treasure trove, royal fish, and wrecks, and looked after "deodands." ‡ He

---

* Introd. xv–xix, to which I am largely indebted.

† "He hath principally to do with the pleas of the Crown—and in this light the Lord Chief Justice of the King's Bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm." (Bl. *Comm.* i. 345.) So may all the judges of the High Court.

‡ The instinct which leads the golfer to break his club so that it shall bring no more woes upon the human race, is inherited from his ancestors, who if death was caused by animals or inanimate objects took vengeance on the offending object. The manslaying ox in Exodus xxi. 28 is to be stoned; the Athenians banished the axe (Æschines, κατὰ Κτησιφ., 244, 245). In the second century after Christ Pausanias notes that they still sat in judgment on inanimate things in the Prytaneum (i. 28 (ii)). Mr. Tylor tells us that "if a tiger killed a Kuki (Southern Asia) his family were in disgrace till they had retaliated by killing and eating the tiger or another; but further, if a man was killed by a fall from a tree, his relatives would take their vengeance by cutting the tree down and scattering it in chips."

"Thus, too, by an ancient law," says Blackstone, "a well in which a

is best known to-day in connexion with unexplained deaths. This was always an important part of his work, merely because a death was pecuniarily interesting to the king. Failure to present Englishry, forfeitures on conviction for felony, for suicides, forfeitures of deodands, all were so much to the good. He was the king's *oculus*, although he was elected in the County Court,* at any rate after the Statute West. I, and his name was submitted to the king for approval.

From the clause in Magna Charta, "nullus vicecomes constabularius vel coronatores . . . teneant placita coronæ meæ," it may be inferred that he was in the habit of trying criminal pleas, and after that date he passed judgment on felons caught in the act. He frequently sat in the County Court with the sheriff, taking civil pleas, and in default of the sheriff executed the royal writ.

He also linked the Royal and Manorial jurisdiction, for it was his duty to be present in privileged baronial courts when

---

person was drowned was ordered to be filled up under the inspection of the coroner." (Fleta, l. 1, c. 25, § 10.)

The same underlying feeling explains the *noxæ datio* of the Roman Law. The thing is guilty: it, and not its owner, is to be punished. It is to be handed over to the relatives of the dead man to do what they please to it.

So in our law in death by misadventure, the thing causing the death was forfeited, according to the laws of Ine and Alfred, to the kindred, but later in Bracton's time to God *pro rege*. In the thirteenth century the thing was taken by the sheriff or the coroner or other officer and sold, and at the next eyre an order was made for him to accouut for its value. The justices could direct for what specific purposes the money should be applied, charitable or public, *pro deo*. Thus, when in 1221 some persons fell out of a boat on the Severn and were drowned, the record says, "value of boat eighteen pence, dentur deo ad pontem"; *i.e.* to build a bridge (*Select Pleas of County of Gloucester*, 55). The Church seems to have seen an opportunity of making a claim, on the ground that as the person died unconfessed in actual sin, the thing should be devoted to buying masses for his soul, in the same way as the apparel of a stranger found dead was applied to that purpose.

Blackstone speaks of the deodand as forfeited to the king, to be applied to pious uses and distributed in alms by his high almoner (*Inst.* i. 300). "It matters not," he says, "whether the owner were concerned in his killing or not, for if a man kills another with any sword, the sword is forfeited as an accursed thing. And therefore in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as that the stroke was given by a certain penknife value sixpence), that the king or his grantee may claim the deodand" (*Inst.* i. 301).

The accursed thing was known as the "bane." Deodands were abolished in 1846 (9 & 10 Vict. c. 62).

* There are usually four coroners in a county, but sometimes three or even two. Some boroughs had their own by special grant. Bristol, for instance, had four.

felonies were tried, and to watch in the interest of the king, and he could enter "liberties" when the sheriff was excluded.

If a thief was caught red-handed on the land of a lord who had infangthef, the capital sentence could only be inflicted when the coroner was present.

It was his duty to hold inquests as to the manner of death of those supposed to have died, by violence, accident, or in prison, to apprehend the guilty, and attach all who knew anything of the circumstances or with whom the dead man lived, and keep them till the itinerants came, and the inquisition of the coroner to-day is, as it always has been, a formal accusation of any person found by it to have committed murder or manslaughter (or to have found and concealed treasure), and a person may be tried on such inquisition without further accusation. In practice, however, cases of homicide are always investigated by a magistrate, who commits to the Assizes or the Central Criminal Court, and by the Coroners (Amendment) Act, 1926, if a person has been already charged before the magistrates with a homicide, the coroner, if his jury has already not given its verdict, shall adjourn the inquest till the criminal proceedings are over, and then may discharge the jury.* He may also in certain circumstances hold an inquest without a jury (§ 13). He also has power to order a special examination of the body if he thinks that this course will render an inquest unnecessary.†

He must be a barrister, solicitor, or medical practitioner of five years' standing.

The jury need no longer view the body, and the coroner may accept a majority verdict, if the minority does not exceed two.

Little now is left of those activities which made the Plantagenet coroner a considerable figure. The old machinery of justice and police in which he was a wheel, has gone. The eyre, the criminal "appeal," outlawry, sanctuary, abjuration, are mere names to us. Other powers have been expressly taken from him by statute.‡ Treasure trove and sudden death remain, and as to the latter, we have seen that in criminal matters, he has been superseded,—a reform considered by many people overdue.

---

* 16 & 17 Geo. V, c. 59, § 20.

† It is thus unlikely that the exploit of holding an inquest on a Peruvian mummy which had been broken in transit from S. America to Belgium will be repeated (*Aitken* v. *L. N. W. Ry.*, *Times*, Dec. 11, 1901).

‡ 50 & 51 Vict. c. 71.

In one respect the modern coroner has the advantage—he is paid a salary. He is appointed and paid by the County Council.*

The Coroner's Inquest.

The Coroner's Jury.—The composition of the coroner's jury or inquest varied. As a rule it was made up in whole or part of representatives of the four neighbouring townships (*villatæ*), including that in which the dead body was found.

The most common constitution was twelve men, representing, it is suggested, the hundred, and the reeve and four men from each township, making thirty-two in all. There was no invariable method in which the verdicts were given. They might be given separately, one by the townships, one by the hundred, or each township might give its verdict apart from the others ; sometimes the inquest was *per duodecim iuratores*, the *duodecim* coming from the townships.

In time, however, this jury, like the others, was taken from the body of the county.

---

* 51 & 52 Vict. c. 41 ; 16 & 17 Geo. V, c. 59.

CHAPTER XVIII

THE JUSTICES OF THE PEACE

The Peace and its "Conservators."—While the king's judges disposed of the heavy crime, police duties and the treatment of petty offences were left to the local authorities, of whom the sheriff and coroner were the most prominent. Certain great men, it is true, such as the judges, were ex officio "conservators" of the peace, and the Crown issued now and again extraordinary commissions of gaol delivery, oyer and terminer, and Trailbaston.

But the system did not work well, and neither the sheriff nor the coroner, when he became an elected officer, kept the confidence of the Government. The Crown resorted to the well-tried principle of directly appointing Commissioners, who were afterwards known as Justices of the Peace.

Keepers of the Peace.

Statutory Regulation.—If any steps were taken before the reign of Edward III their nature is quite uncertain. But in 1327 we meet a new class of commissioner. The Statute 1 Edw. III, st. 2, c. 16, provided that in every county good men and lawful should be "assigned to keep the peace" with, however, very limited authority.

Three years later they were given the power of receiving indictments, and of keeping the persons indicted in custody till the judges of gaol delivery came round.*

Justices.

By 18 Edw. III, st. 2, c. 2, *judicial* powers were conferred on them, viz. to hear and determine felonies and trespasses against

* 4 Edw. III, c. 2.

the peace, with others wise and learned in the law, and to inflict punishments reasonably.

By 34 Edw. III, c. 1, separate commissions were provided for each county. The qualifications requisite and the extent of the duties are set forth, and authority given to hear and determine, at the king's suit, felonies and trespasses done in the same county, and to take sureties for good behaviour from suspected persons.

The Court of Quarter Sessions.

In 1388 the number of justices in each commission was fixed at six, not counting the judges of assize, and they were directed to hold their sessions four times a year.

Some later statutes were passed in the next reigns, under which the restriction on the numbers was removed, new duties added, and by which the dates of the sessions were fixed; but the court formed in 1388 is substantially the Court of Quarter Sessions of to-day. Its times of meeting are now regulated by 11 Geo. IV, 1 Will. IV, c. 70.

The activity of the justices seems not to have been all that was desired, for the Statute 4 Hen. VII, c. 13, recites that the justices of the peace have been negligent and misdemeaning, and directs that complaints must be made to the king or his chancellor, which probably means "making a Star Chamber matter of it." In Henry IV's reign they were directed by statute to put down riots, with the sheriff and his "posse," and were told that they could only imprison people in the common gaol, which looks as though they had been using their own castles for the purpose.

Its Jurisdiction and Procedure.

The jurisdiction of Quarter Sessions rested till 1842 on these statutes and on the commission issued thereunder, which was "settled" in 1590 and has been in use ever since, embracing all crimes except treason, subject only to this, that in cases of difficulty a judge of one of the benches or of assize ought to be present. This jurisdiction was exercised, and sentences of death were pronounced and executed accordingly. But in practice these powers were gradually dropped, and the limits of jurisdiction are now settled by 5 & 6 Vict. c. 38, which removes the cognisance of treason, murder, capital felony, felony punishable on first conviction with penal servitude for life, and some other specified

offences. By 59 & 60 Vict. c. 57, Quarter Sessions were empowered to try cases of burglary.

The procedure at Quarter Sessions is as at Assizes, by presentment by a grand jury and trial by a petty jury. The Quarter Sessions also here appeals by way of rehearing from convictions at petty sessions, and also appeals in Licensing, Rating, and Poor Law matters.

Borough Quarter Sessions.—Of the Borough Courts of Quarter Sessions it must suffice to say that from very early times charters of incorporation have been granted to towns, containing grants of courts of varying importance.

The Recorder.—In such cases the corporation was generally authorised to appoint a judge of their own, usually a Recorder, with criminal and sometimes civil jurisdiction. In 1834 these charters and jurisdiction were investigated by a Commission, following on the report of which the Municipal Corporations Act, 5 & 6 Will. IV, c. 76, was passed, empowering the Crown to grant a separate Court of Quarter Sessions to any borough scheduled in the Act that presents a petition stating the salary that it is proposed to pay the Recorder, and the right to appoint the Recorder is transferred to the Crown. The Recorder is to hold his court four times a year or oftener, and he is the sole judge of the court.

In matters of crime the procedure and jurisdiction of such a court is identical with that of the County Quarter Sessions.

The law on the subject was consolidated by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

Courts of Summary Jurisdiction.

Summary Jurisdiction.—Statutes at various times gave power to one or two justices, sitting together, to inflict summarily small penalties on unimportant offences, such as trifling nuisances or misconduct, and profane cursing or swearing.* "Summary jurisdiction" imports trial without either grand or petty jury.

By 11 Hen. VII, c. 3, justices of assize and justices of the peace may upon information hear and determine, *without a jury*, all offences, except treason, murder, or felony, committed against any statute not repealed.

---

* 19 Geo. II, c. 21.

This Act was repealed in the next reign, but was the beginning of summary jurisdiction in its more extended sense.

The procedure to be used was left very vague, and was at last regulated by 11 & 12 Vict. c. 43.

Petty Sessions.—Under several statutes passed in 1828, 1847, 1849, 1855, 1861, 1871, and 1879, provision was made for dividing counties into petty sessional divisions, and the offences triable thereat and the penalties which may be inflicted were therein declared.

It is enough to say that, except where by statute one justice sitting alone may act, two justices sitting together have a petty criminal jurisdiction over what may be called police offences and minor breaches of the peace, with a power of inflicting terms of imprisonment not exceeding six months. Where, however, the offence, other than assault, is punishable with more than three months' imprisonment, the accused has the option of being tried at the Quarter Sessions or Assizes before a jury.

The justices of the peace are appointed by the Crown acting through the Lord Chancellor, who takes the recommendation of the Lord-Lieutenant in the case of the county bench.

The Stipendiary.—Stipendiary magistrates exist in the metropolis, and other towns, in virtue of various statutes. They are appointed by the Crown on the advice of the Home Secretary, and when acting judicially have all the powers of two justices of the peace sitting together. Like the justices of the peace they hold office "durante bene placito."

CHAPTER XIX

CRIMINAL TRIAL AND THE CRIMINAL JURY

Since the Norman Conquest there have been three modes of accusation :

(i) appeal or accusation by a private person ;
(ii) indictment or accusation by a grand jury ;
(iii) criminal information.*

There have been three modes of trial :

(i) battle ;
(ii) ordeal ;
(iii) by jury.

Compurgation.—The method of defence known as Compurgation did not in criminal cases long survive the Norman Conquest, though in civil actions, as Wager of Law,† it maintained a shadowy existence till 1834, when its appearance in the case of *King* v. *Williams*,‡ having informed the legislature of its existence, insured its abolition by 3 & 4 Will. IV, c. 42.

---

* A criminal information may be preferred only for misdemeanours, and only by the Attorney-General, the Solicitor-General, or the Master of the Crown Office, "on the order of the Queen's Bench Division made on motion heard in open Court" (cf. 4 Will. & Mary, c. 18).

The law officers, there is reason to suppose (*Rex* v. *Berchet and others*, 1 Show. 106–21, 1689), exercised this right from *temp.* Edward I to the Revolution in the King's Bench without indictment by Grand Jury, and the procedure was ordinary before the Council and Star Chamber, and is recognised and regulated by several Acts of Parliament.

† When the party to whom the proof was given, gave security that he would bring compurgators, he was said to "wage his law" (*vadiare legem*). When he brought them and succeeded he was said to "make his law" (*facere legem*).

‡ 2 B. & C. 538.

The Appeal.

The *Appeal* was private accusation by the person primarily wronged, and was the regular method under the Normans of dealing with crime. Till justice and police are efficiently taken in hand by the State, private vengeance holds the field.

The Appeal was tried by combat or Wager of Battle, a form of legal procedure familiar to the Normans, though there is no trace of it in Anglo-Saxon history. Ordeal was, on the other hand, well known here. Combat may be said to be a bilateral kind of ordeal : both were appeals to the judgment of God. Some people could not fight—the king, a woman, an infant, a man who was maimed or over sixty. In cases where there could be no battle, and no compurgators could be found, or the man was of notoriously bad character, he went to the ordeal.

The proper method of suing an appeal of felony was for the complainant to raise the hue promptly, go with it to the nearest vills, and there declare the crime, then go to the king's serjeants, then to the coroners, and then to the next county court.

At this county court, before the sheriff and coroners, the appellor made a formal and detailed statement, in order that the appellee might know what he had to answer. If the appellee did not appear he was called or "exacted" at the next four consecutive county courts. If the appellee did not then appear, judgment of outlawry was given. If the appellee appeared, the appeal was removed by writ into the king's court,* where the appellee raised any plea or exception he thought fit. If he did not plead, or pleaded inadequately, battle was directed between the parties ; but the judges were to inquire, and not allow battle if the circumstances were such that there were "presumptiones quæ probationem non admittunt in contrarium" : as, for instance, if an appellee was caught standing over the dead man with a bloody knife, or taken with the "mainour." This is an application of the general rule of our early law, that if a culprit is taken red-handed, no accuser is wanted, and no defence allowed ; he is convicted. In most cases after the disappearance of "ordeal" appellees had the option of defending themselves *per corpus*, *i.e.* by battle, *per patriam* (*vide infra*), but not always. In secret crime, such as poisoning, he must defend himself *per corpus*, for, as Bracton says, the *patria* could know nothing of a concealed fact

* *Sel. Cor. Rolls* (Seld. Soc.), 66.

like this. If the appellee was defeated before the stars appeared he was hanged : if not, or if he won, he was acquitted from the appeal, but as the appeal raised a presumption of guilt, he was tried by the country as if he had been indicted.

The only appeals which had any definite history were those of murder.* This seems to have been the usual way of prosecuting murder to the end of the fifteenth century. Indeed, in 1482 (22 Edw. IV), it was determined that a homicide should not be arraigned at the king's suit within the year, in order to save the suit of the party, because by the Statute of Gloucester (6 Edw. I, c. 9), an appellor was restricted to a year and a day within which to bring his appeal. This was so mischievous, that four years later (1486) we find a clause in the statute known as the Star Chamber Act (3 Hen. VII, c. 1) which recites that "the party is oftentimes slow and also agreed with, and by the end of the year all is forgotten, which is another occasion of murder. And also he that will sue any appeal shall sue in proper person, which suit is long and costly that it maketh the party appellant weary to sue." Indictments for murder accordingly were to be tried at once, but an acquittal on an indictment was to be no bar to an appeal. Accordingly, an indictment was usually tried first, and was

* There are one or two cases recorded of a "commoner" appealing a peer for treason. If battle was waged in the appeal, it was a matter of great public expectation, and the king provided weapons, tents, and all the paraphernalia of a fight, and money for the combatants to get whatever was requisite. In the 25th year of Henry VI the Prior of Kilmaine appealed the Earl of Ormonde of treason : the field of battle was prepared, but the king at the instance of "certain preachers and doctors" took the quarrel into his own hands. But all preparations had been made. In the Proceedings and Ordinances of the Privy Council we have the king's letter to Ormonde permitting him to go for a time and stay near Smithfield "for your breathing and more ease"; and Philip Treher, fishmonger of London, who had by the king's command been giving the Prior a few lessons in "certain points of armis," was given £20 by his Majesty (Nicholas, vi. 129–40) for his pains. Things did not always fall out so smoothly. In the same year John Davy, an armourer's apprentice, appealed his master William Catur of treason, and battle was agreed and a day settled by the Constable and Earl Marshal. We have the king's writ under the Privy Seal directing the Serjeant of the Armoury properly to arm the Appellant, and another letter from the king to Philip Treher, bidding him to be "intendaunt and of counsaill" to the said appellant. Seconds were also appointed for the appellee. The battle took place at Smithfield. "The master being well beloved was so cherished by his friends and plied so with wine that being therewith overcome was also unluckily slain by his servant : but that false servant (for he falsely accused his master) lived not long unpunished, for he was after hanged at Tyburn for felony." (Nicholas, vi. 55, 59 ; and Stow's Chron. by Howes, p. 385.)

practically conclusive, unless the prisoner was acquitted under circumstances which greatly dissatisfied the relatives of the dead man. In 1819 appeals were finally abolished by the Statute 59 Geo. III, c. 46, following on the appeal in *Ashton* v. *Thornton*.*

The New Criminal Procedure.—We have noticed the reforms of Henry II, in civil procedure; it remains to say that he revolutionised criminal justice. By his two Assizes of Clarendon and Northampton he introduced a new system of accusation by indictment,† or arraignment at the king's suit, which in the end superseded the process by Appeal.

In 1176 the Assize of Northampton appeared. It was a recension of the Assize of Clarendon (1166), with some additions and alterations making it more rigorous. The provision that we are at present concerned with was this: that "if any one were accused before the justices of our lord the king of murder, theft, or robbery, or harbouring men who do such things, or forgery, or arson, by the oath of twelve knights in the hundred, or if no knights, twelve lawful men and four men from each township in the hundred, let him go to the ordeal of water, and if he fails let him lose a foot and the right hand, and exile himself within forty days. If acquitted by ordeal let him find pledges and remain unless the accusation be of murder or base felony, when he must abjure the kingdom in forty days." ‡

To a sworn presentment therefore of murder or base felony the ordeal no longer offered a complete defence.

But ordeal had not long to live. Rufus had commented on it very unfavourably as a method of discovering truth, when fifty men accused of killing the king's deer emerged triumphantly from the ordeal. The king said that in future he himself and not God would try these cases.§

---

* 1 B. & Ald. 405.

† A jury of presentment is mentioned in the Laws of Ethelred. In every wapentake the twelve senior Thanes shall go out with the Reeve and swear that they will accuse no innocent man, nor conceal any guilty one. The form survives to-day in the oath of the grand jury. (Stubbs, *Sel. Ch.* p. 72.)

‡ Stubbs, *Sel. Ch.* p. 151. This "implied prohibition" practically abolished compurgation in the king's courts in the graver criminal cases, though it lingered on in the local ecclesiastical courts. The method was much valued in pleas of the Crown, as it was considered more favourable to the prisoner than a jury, and was jealously preserved in London (see the Royal Charters of Hen. I, II, III; John; Rich. I, II; and Edw. I, II, III).

§ The king "stomachatus" said, "Quid est hoc? Deus est iustus iudex? Pereat qui deinceps hoc crediderit. Quare per hoc et hoc meo iudicio amodo respondebitur non Dei, quod pro voto cuiusque hinc inde plicatur." (Eadmer, *Hist.* 102.)

Disappearance of Ordeal.—The Lateran Council in 1216 condemned the ordeal, and prohibited the clergy from assisting at it. In our country this direction met with immediate obedience.* By letters patent, issued January 26, 1219, an Order in Council was sent after the judges who had already started on their eyres, telling them that the Church had prohibited judgment by fire and water, and directing them generally that in the circumstances, if grave crimes were brought before them, the prisoners must be kept in strict custody "ita quod non incurrant periculum vitæ et membrorum." This last provision disappears in the Statute 3 Edw. I, c. 12, which directs prison "forte et dure"; if there were crimes of a middle character, where ordeal would have been employed, the accused are to abjure the realm, and in trifling offences they must give pledges to keep the peace, but the judges are to use a large discretion.

Difficulty about a Substitute.—But nothing is said in the Order about putting the accused persons on their trial. The truth was that a very great difficulty had now been raised. Trial by ordeal and compurgation had gone, but the accusation by a grand jury remained, and there was no method left of ascertaining the truth of the accusation. Battle was a method of proof only allowed in the case of appeals. The king, at whose suit the criminal was prosecuted, could not bring an appeal, for he did not see or hear the crime,† and he could not fight. The only way was trial by the country, just as in an appeal by a woman or a maimed man, for these were not expected to fight.

Trial "per pais."—But what was to be done if the prisoner declined to put himself upon his country? It was considered an injustice to try a man by a jury, if he did not consent, for the method was not a "legale iudicium parium," nor "secundum legem terræ." It may be that it was considered that mere human testimony was not enough when a man was being tried for his life. Indeed in the *leges Henrici* it is said that "no one is to be convicted of capital crime by testimony"; "God may be for him,

---

* In 1679 the Jesuit Gavan startled the court by asking to be tried by ordeal. To which the L. C. J. humanely replied, "You are very fanciful, Mr. Gavan; you believe that your cunning in asking such a thing will take much with the auditory: but this is only an artificial varnish: our eyes and understandings are left us, though you do not leave their understandings to your proselytes." (*7 S. T.*, 383.)

† "Cadit appellum ubi appellans non loquitur de visu et audito" (Bract. ii. 434).

though his neighbours be against him." Yet an inquest was not obscurely indicated. In criminal as in civil cases "exceptiones" or incidental questions were tried by a jury either by consent or by purchase from the king. These "exceptiones" in time touched closely the question of guilt or innocence. Thus one "exceptio" could raise the question of an "alibi," another, the "exceptio de odio et atia," alleged malice in the accuser and inferentially the innocence of the prisoner. Such an "exceptio" was frequently decisive.* It is not a long step when the accused man puts himself on a jury on the main question. *Ponit se super patriam de bono et malo*—for good or ill. Sir F. Palgrave gives instances of persons accused by presentment, even before the ordeal went out of use, buying from the king the benefit of going before an inquest of *legales milites*, to have it pronounced "utrum culpabilis sit inde necne."

To choose a jury is one thing, to be forced to take one is another. If the prisoner was obstinate, a strong judge might disregard his objection. Thus at Warwick in 1221, Martin Pateshull, finding two prisoners who refused to put themselves on their country, as the phrase went, chose twenty-four knights, who endorsed the accusation of the twelve men of the hundred, and on that hanged them both.†

Consent to be Compelled.—But the prejudice triumphed, and it became settled that an indicted man could not be tried by a jury unless in answer to the question how he would be tried, he answered, "By God and my country." Efforts were then made to extort his consent. He was placed in rigorous confinement, put in irons, and fed on alternate days on bad bread and stagnant water till he either pleaded or died. In the case of *Hugo*, when he refused to plead, the judge said that he had much better do so. "Scilicet uno die manducabitis et alio die bibetis: et die quo bibitis non manducabitis et e contra: et manducabitis de pane ordeaceo et non salo et aqua." ‡

---

* Such an inquisition must be given gratis. Mag. Ch. c. 36. See Maitland, *Const. Hist.* 129. "Pais" or "Pays" = country or *patria*.

† *Sel. Pleas of the Crown* (Seld. Soc.), 99–101. See also (*ibid.* 127) the case, in 1220, of the man who put himself on the counties of Essex or Norfolk or Southampton of all of them, as to his good character, and then on the county of Surrey or upon all men in England that knew him. Then came twenty-four knights of Surrey at the king's command. And he put himself on them, and was hanged.

‡ Y. B. 30 & 31 Edw. I (Rolls Series), 529.

The "peine forte et dure."—This developed into the extraordinary procedure known as the *peine forte et dure*, which was that he was to be stretched on his back naked, and to have iron laid upon him, as much as he could bear and more; indeed, as late as 1726 one Burnwater, who was accused at Kingston Assizes of murder, refused to plead, and was pressed for an hour and three-quarters with nearly four hundredweight of iron, after which he pleaded not guilty, and was then tried, convicted, and hanged.

In 1658 Major Strangeways was pressed to death in ten minutes, under a wooden frame, with weights on it placed anglewise over his chest; several persons standing on the frame to hasten his death. A milder form of persuasion, by tying the thumbs with whipcord, was practised in 1734 at the Old Bailey.*

The practice was not formally abolished till 1772, by 12 Geo. III, c. 20, when standing mute of malice was made equivalent to a conviction. By 7 & 8 Geo. IV, c. 28, it was directed that a plea of not guilty should be entered in such a case.

The object of refusing to plead in a felony was that, as there was no conviction, there was no forfeiture, and the property of the accused person was thus saved for his family. But if the man did put himself upon his country, how was he tried? We know from Bracton something of what took place when the itinerants came round. They came, read their commission, talked about their useful errand, withdrew, and called to them four or six *busones comitatus*, told them their duties, swore them to obey, went back to court, summoned the bailiffs of the hundreds, swore them to choose four knights for each hundred, who came and swore to elect twelve other knights, or *liberos et legales homines*.

The Presenting Jury.—These twelve were scheduled, and, when produced, were sworn. The *capitula* were read to them, and they had to bring their answers on a certain day, and to say amongst other things against whom there was a common fame.

It was not necessary for the presenting jury to believe in the report which they made, and it is fairly certain that they would omit nothing that they could remember; for the judges in eyre had other sources of information, and notably had before them the sheriff's and coroner's rolls, which told them a good deal that had gone on in the county since the eyre last came, and omissions on the part of the presenting jury were visited with amercements. If

* Steph. *H. C. L.* 300.

A is presented by the jury as *malecreditus*, *i.e.* as a "suspect," the judges question the jury about the grounds of the report, whereupon, says Bracton, some one will perhaps say, or the greater part may say, that their presentment was learned from one of themselves, and this is investigated. The report may at last be traced "ad aliquam vilem at abiectam personam," one to whom credit is not to be given. If the matter is proceeded with, the person who is presented is asked how he will clear himself, and we will assume that he puts himself on his country.

The Jury of Deliverance.—The prevailing practice at first was to ask the presenting jury "præcise dicere" "guilty" or "not guilty." This is not quite the same question that they were asked before, but the accused person would naturally prefer a fresh jury without prepossessions, the more so as sometimes members of the presenting jury were punished if they said Not Guilty afterwards. And so we find cases where when the presenting jury has said "Guilty," another jury is brought and asked if they agree, or other persons are added to the presenting jury; the prisoner was also allowed to challenge a juryman on the ground of enmity, and after a while because he had been on the presenting jury. In time a custom grew up of impanelling a fresh jury of twelve, drawn from the juries of the other hundreds. But it was the early practice to have some of the indictors on the trial jury, otherwise "it was not well for the king." * Still a feeling was growing up that none of those who presented an accused person should be on the inquest which tries him, and this was embodied in a statute of 1352.†

Functions of the Juries.—It will be noticed that though we have got as far as a jury to present, which corresponds to the Grand Jury of to-day, and another to try, *both juries give their verdict from their own knowledge of the facts.* And "knowledge" included information which they gathered by informal investigation, so much so that according to Britton the jurors may be strictly examined by the justices as to "how they are informed of the truth of their verdict," when it may be discovered to be mere tavern gossip or worse.‡

We know that the trial or petty jury has now a different character, for it gives its verdict according to the evidence and

---

* Y. B. 14 & 15 Edw. III, 261. † 25 Edw. III, st. 5, c. 3.

‡ The last relic of the old view disappeared in 1826, when the necessity to have hundredors on the petty criminal jury was formally done away with. (6 Geo. IV, c. 50.)

not from its own knowledge. In the book which Fortescue wrote between 1460 and 1470, *De laudibus legum Angliæ*, there occur expressions of an ambiguous nature which leave it in doubt how far the change has progressed, as that "the law of England never decides a cause only by witnesses, when it can be decided by a jury of twelve men." *

After a considerable period, when the petty jury began to be considered judges of presumptions rather than witnesses, the practice started of bringing in written papers, depositions, informations, and examinations taken out of court. But it was a long time before it was thought necessary to produce evidence to support a prosecution, and longer still before the prisoner was allowed any evidence at all.

A method of trial, where witnesses in our sense are rarely if ever called, may do its work well enough in a small community where everybody knows what everybody else is doing; but these primitive conditions did not last for ever, and when they changed, the position of an accused person must have been, according to modern notions, extremely harsh and difficult. He was not permitted to call witnesses. Queen Mary is said to have directed the judges to allow prisoners to call witnesses in felony: but this was regarded as an indulgence, the rule being that witnesses were not to be heard against the Crown, even in felony, and if such witnesses were called, they were not sworn.

Earlier Criminal Trials: the Position of the Prisoner.—Before the great civil war the following were the features in which a criminal trial differed from a criminal trial of to-day. (1) The prisoner was confined more or less secretly, and could not prepare his defence. He was examined, and his examination taken down and used against him. (2) He had no notice of the evidence which was going to be produced against him. (3) He had no counsel either before or at trial. (4) There were no rules of evidence as we understand them. The witnesses were not necessarily confronted with the prisoner, nor were originals of documents produced; the confessions of accomplices were not only admitted, but were regarded as specially cogent. (5) The prisoner was not allowed to call witnesses on his own behalf; had he been permitted, he could not have done so with effect, for he could not find out what evidence they would give, or procure their attendance.

---

* c. xxxii.

In later times they were not examined on oath even if they were called.

After the civil war some improvements were made. In 1695 * persons indicted for high treason or misprision of treason were to have a copy of the indictment five days before trial, and to have counsel, and witnesses upon oath. In 1708 † the prisoner was allowed to have a list of the witnesses and of the jury ten days before his trial. In 1702,‡ in cases of treason *and felony*, the prisoner's witnesses were to be sworn as well as the witnesses for the Crown.

A practice also sprang up, the growth of which cannot be traced, by which counsel were allowed to do everything for prisoners accused of felony except address the jury for them. This we find in operation in 1758.§ On the other hand, at the trial of Lord Ferrers, two years afterwards, the prisoner was obliged to cross-examine the witnesses without the aid of counsel, and was even put in the embarrassing position of having to examine the very witnesses called to prove the defence of insanity which he himself was setting up. By 6 & 7 Will. IV, c. 114, all prisoners accused of felony are permitted to make their full defence by counsel.

It is pointed out by Mr. Justice Stephen,‖ that the experience of the reigns of Charles II and James II showed that juries might be quite as unjust and tyrannical as the Star Chamber, and that they were equally likely to be unjust on any side in politics. After the Revolution, when one of the great parties of the State had won a decisive victory, the administration of criminal justice became decorous and humane ; and as it was mainly left in the hands of private persons between whom the judges were really indifferent, the questions which were involved came to be fully and fairly investigated, it being left to each party to the contest to do the best he could to establish that view of the case in which he was interested.

---

* 7 & 8 Will. III, c. 3. † 7 Anne, c. 21. ‡ 1 Anne, st. 2, c. 9.
§ *William Barnard's case*, 19 *S. T.* 815. ‖ *H. C. L.* i. 426.

CHAPTER XX

CIVIL PROCESS AND THE CIVIL JURY *

In early civil process in this country there is no weighing of evidence, for the methods are those of proof and not of trial.

Burden of Proof.

Proof was one-sided, and the battle was usually won or lost when the court settled who was to give the proof. To be given the proof might be a burden, or it might be a privilege; it might mean victory, it might mean disaster. Questions of such delicacy and importance were not permitted to arise without some *primâ facie* evidence produced by the complainant. His bare word, or "simplex vox," was not good enough.†

The complainant's witnesses were called the "secta." The secta was not necessarily sworn or even examined for the plaintiff; but the defendant could, if he chose, stake his case on the examination of it, and if it disagreed he won. If it agreed, he was allowed to wage his law and produce twice as many, up to twelve, to support him. If these would not swear or disagreed he lost.‡ Otherwise the "secta" was not sworn; it was frequently made up of relatives or dependants, and at a later date was not even produced,§ though it survived as an allegation in pleading till 1834, "and therefore he brings his suit."

---

* On this difficult subject reference should be made to Thayer on Evidence.

† Cf. Magna Charta, § 38.

‡ But the defendant was not allowed to wage his law against a writing, his proper defence being *nient le fait*, *i.e.* it is not the defendant's deed.

§ In 1433 the court declined to examine the "secta," tender of it being only formal. (Y. B. 17 Edw. III, 48, 14.)

Methods of Proof.

In trying a civil case, resort might be had to ordeal, battle, oath, or witnesses.

The two first may be dealt with briefly, for they did not live long.

1. Ordeal, though not so frequent in civil as in criminal process, was not uncommon in cases relating to lands * or status,† but fell into disuse after the decision of the Lateran Council.

2. Battle is described by Glanvill as one of the chief modes of trial in the King's Court in cases of debt, and we have seen that it was the ordinary mode of determining a "writ of right"; the witnesses came prepared to fight,‡ and could be challenged by the other side.

But this method was hated by the English; the charters and usages of various towns, as London and Ipswich, gave exemption from it, and it died a lingering death after the institution of Henry's Grand Assize.§ The Statute 59 Geo. III, c. 46, abolished the process, with special reference to its use in appeals and in writs of right.

Originally the champion was the witness who offered to prove his statement *per corpus suum.*

3. The Oath, if taken by the defendant, was sometimes allowed to clear him. But the popular mediæval method was the oath of the defendant supported by oath-helpers, or as they are now called compurgators. These were not witnesses of fact, but rather to character, and appeared as believers in their principal. They might be kinsmen. It was the chief method of trial in the popular courts, and in the King's Court in personal actions, and was marked by excessive addiction to formality. Although highly prized this method of "wager of law" became exceptional, surviving chiefly in actions in debt and detinue, till its unexpected appearance in *King* v. *Williams* || led to its abolition by statute in 1834.¶

4. Witnesses.—Before Henry invented his Assizes and brought the Inquest or Recognition into fashion, justice was done in the local courts and judgment given by the *pares curiæ.* Some

---

* Pl. Ang.-Nor. 40–43. † *Ibid.* 43. ‡ *Ibid.* 19.

§ In 1304 the court refused to allow battle in trespass, though the parties had agreed. (Y. B. 32, 33 Edw. I, 318–320.)

|| 2 B. & C. 538. ¶ 3 & 4 Will. IV, c. 42.

members of the court might have personal knowledge of the facts; if not, there was the form of one-sided proof, without cross-examination. But we know that Edgar's ordinances provided official witnesses for sales of chattels, twelve at least in every hundred. This was for the protection of buyers, for unexplained possession of a movable which a week ago notoriously belonged to some one else is apt to be dangerous in primitive society. Such persons naturally informed the other *pares curiæ*.

Witnesses were also used to prove age, or death. So in 1219 * the defendant said the plaintiff was a minor. This the plaintiff denied, and said the court might inspect him, and if they doubted he would bring his mother and relatives. The court said he must bring twelve *legales homines*. This was not a jury, for he could select whom he pleased. According to Bracton such a one swears he is twenty-one and the rest swear the oath is true, and then they have to give reasons for their belief, and each gives his reason. The delicate and dangerous question of a lady's age was apparently reserved for the court on personal inspection.† By the time of Henry VII the question might be settled by a jury.‡

The "Exceptiones."—A fresh beginning was made when Henry II adapted the system of Inquests to the Assizes. The recognitors of the Assize, or shortly "the Assize," was a small body chosen *ad hoc*, as being likely to know the truth of the matter in dispute. But it was summoned to answer a particular question *and no more*, and the defendant could raise "exceptiones" to the writ, or the person, or the assize. If he excepted to the assize, all the "operative words" could be disputed, such as *iniuste et sine iudicio—disseisivit eum—de libero tenemento suo—in tali villa*. All these exceptions were "out of the assize," and could not be determined by the recognitors of assize. They were subsidiary; and at first not being cognisable by the assize were tried by battle, unless either by consent or order of the court, or *per preceptum domini Regis*,§ the verdict of a *iurata* or jury was taken which was sworn *ad hoc*.‖

---

* Bract. Note Book, ii. case 46.

† Even the king's judges sometimes confessed themselves unequal to the emergency. In Y. B. 50 Edw. III, 6, 12, Cavendish, C.J., declined flatly to inspect a lady, saying, "There is not a man in England who can rightly adjudge her of age or under age. *Some women who are thirty years old will seem eighteen.*"

‡ Y. B. 21 Hen. VII, 40, 58.

§ *Rot. Cur. Reg.* ii. 189.

‖ When the parties put themselves on a "iurata" they put themselves on

The "Iurata."—Commonly the assize being ready on the spot was asked to decide the point: while doing so it is not an assize, it is a *iurata, assisa vertitur in iuratam.*

The king's judges seem to have forced the *iurata* on the litigants, and in all *new* forms of action not covered by established rules trial by jury was the recognised mode.* The Statute 15 Hen. VI, c. 5, recites that this method is now general in cases touching life and death, lands and tenements, goods and chattels of every one of the king's subjects.

The "Patria."

If a man put himself on his "country," the country was represented by persons who were likely to know the facts.† These persons came *de vicineto*, though in time the requirement of vicinage was satisfied if some came from the hundred to inform the rest. The number of necessary hundredors, which in the reign of Edw. III was *six*, was in the time of Fortescue reduced to *four*. The Statute 35 Hen. VIII, c. 6, restored the number of six, a provision soon virtually repealed by Statute 27 Eliz. c. 6, which required only *two*. It was not till the necessity for the presence of hundredors in civil cases was abolished, it being sufficient if the jury came from the body of the county at large.‡

If the "patria" did not know of itself, it was expected to collect evidence, and certify itself, as the writ said, "se inde certificent," and it was allowed about a fortnight for doing it.§ But it is not known when the witnesses first made their formal appearance in court. Charters and writings were from the first shown to the jury.

Challenging of Witnesses and Jurors.—Documentary evidence apart, it seems that *temp.* Edward III a distinction is appearing, in

---

the "patria." The distinction is this. In an "assize" the facts were to be declared by a body of men, summoned by an original writ, to pronounce *of their knowledge* on issues mentioned in the writ. In an inquiry "per patriam" the facts in issue are unknown at the beginning, but emerge on the pleadings, and must be determined by a jury summoned subsequently by *Venire facias*, who decide *to the best of their belief.*

* See Stat. Walliae, c. xi.

† The parties might "put themselves" on one man who knew the facts: as in the case where a defendant asserted that the plaintiff "assigned" him to pay money to the Earl of Oxford. The plaintiff denied this, and *et se de hoc ponit super ipsum comitem.* The defendant does the like. A writ is sent to the earl, who comes and says the assignment was made. (*Rot. Cur. Reg.*, No. 140; Pasch. 34 Hen. III, m. 17.)

‡ Blackstone, iii. 360.

§ Britton, ii. 87.

that witnesses cannot be challenged, while jurors can; and that while the jurors are sworn to tell the truth to the best of their knowledge, "secundum credulitatem," the witnesses are sworn *de veritate* to tell the truth simply, for they ought to say nothing that they do not know for certain. This distinction, which is significant, was known to the Law Merchant as early as the fourteenth century.* The Law Merchant, indeed, seems to have been far in advance of the Common Law in these matters.

By the time of Henry VI we find Fortescue, the Chancellor, describing trial by jury in a civil action as a trial by evidence: "each of the parties, by themselves or their counsel, in the presence of the court shall declare and lay open to the jury all and singular the matter and evidence whereby they think they may be able to inform the court concerning the truth of the point in question. That each of the parties has a liberty to produce before the court all such witnesses as they please, or can get to appear on their behalf, who, being charged on their oaths, shall give any evidence that they know touching the truth of the fact concerning which the parties are at issue." †

We find that about the same time the judges were expressing the view that if *A.* volunteers evidence to show the truth to *B.* he is guilty of maintenance; he must be asked for his evidence, unless he has some interest in the case.‡

This may have helped to prevent oral testimony from being given in court; and there are indications that as compared with the jury the witnesses are comparatively unimportant. So in 1499, where a jury separated without leave in a storm and talked to a friend of one of the parties, the court said that it was immaterial, for evidence was only given to inform their consciences, and if no evidence were given yet the jury must give a verdict.§

In 1562 || the right was first given to compel witnesses to attend which indicates that the practice of examining witnesses before the jury has become general.

It was regarded as the right of the parties to give information to the jury after impannelling and before trial,¶ and at first the

---

* *The Little Red Book of Bristol*, c. vi.

† *De Laud. Leg. Ang.* c. xxvi.

‡ Cf. Y. B. 28 Hen. VI, 6, 1; and see *British Cash Conveyors* v. *Lamson Store Service*, 1908, 1 K. B. 1006 (C. A.).

§ Y. B. 14 Hen. VII, 29, 4. || By 5 Eliz. c. 9, § 6.

¶ See 6 Hen. VI, c. 2, as to the sheriffs furnishing the parties with a copy of the pannel.

parties could talk to the jury after they had retired ; but in the last half of the fourteenth century this practice and that of giving new documents to the jury after retirement was discouraged by fine and imprisonment, and in 1481 * we find Brian, C.J., delivering to the jury all the material evidence, but what was not material he would not allow to be delivered. But in *Bushel's case*, in 1670,† it seems to have been recognised that a jury might act on its private knowledge, even of documents not known to the parties.

By Statute 14 & 15 Vict. c. 99, *the parties to a civil action became for the first time competent witnesses.*

Unanimity was not at first necessary. According to Fleta if a civil jury disagreed they might be afforced, or compelled by starvation to find a verdict, or the judge might take a majority verdict, *ex dicto maioris partis iuratorum ;* but in the second half of the fourteenth century the rule appears that twelve must agree.‡

The number of the early juries does not seem to have been fixed. Perhaps Henry's recognitions established twelve as the proper number, but this is uncertain.

Law and Fact.

At the present day the general rule is that fact is for the jury, law for the judge. The old popular courts declared the custom and found the facts. But in the fourth year of John a jury says that *non pertinet ad eos de iure discernere.*§ This distinction is found in the second book of the Decretals. where the direction is, that if the facts are admitted, the question is for the judge alone ; if the facts are not admitted, they must be proved by witnesses and not by ordeal or duel.

The Modern County Court.

Although the County Court and the County Court jury are institutions well known at the present day, they have no connexion with the old local courts of the eleventh century. The local courts that survive are either held in chartered towns, as the Passage Court of Liverpool and the Chancellor's Court in Oxford, or are Courts of Request founded on statute.

---

* Y. B. 21 Edw. IV, 38, 1.
† Vaugh. 135, 149.
‡ Y. B. 41 Edw. III, 31, 36; s. c. 41 Ass. 11.
§ Pl. Abbrev. 40 Linc., 4 John.

The modern County Court is the creature of statute. The first County Court Act was passed in 1846, and divided the country into circuits, each with a Court of Record, which had jurisdiction, up to a certain amount, and in specified classes of case. Subsequent statutes have immensely extended these limits, and further extension may well be expected. The judge is appointed, and is removable, by the Lord Chancellor. He sits either alone or with a jury of five, and from him on a question of law raised at the trial an appeal lies to the High Court.*

---

* 51 & 52 Vict. c. 43.

CHAPTER XXI

THE ECCLESIASTICAL COURTS

As the Judicial Committee of the Privy Council is the final Court of Appeal in ecclesiastical matters, we may give in barest outline a sketch of the ecclesiastical tribunals.

Before the Conquest the proper court of the Church was the Court of the Bishop. The bishop was also a secular lord, and had his seat in the Shire and Hundred Moots, where it is supposed that offences of a mixed character were tried which were liable to both civil and ecclesiastical penalties, such as adultery and detention of tithe.*

The Conqueror separated the civil and spiritual jurisdictions and the machinery of ecclesiastical judicature immediately developed.

The ecclesiastical system in its complete form was as follows. The kingdom was divided into provinces, provinces into dioceses, dioceses into archdeaconries, archdeaconries into rural deaneries; and there were besides "peculiars" belonging to the Crown, the archbishops, bishops, deans, chapters, and prebendaries. Proper courts corresponded with these divisions, provincial, diocesan, archidiaconal, ruridecanal, and peculiar.

The Archbishop's Courts.—The provincial courts of the archbishop were essentially the same in both provinces. There were four in Canterbury, and two in York.

Canterbury.

The Court of the Official Principal or the Court of Arches was the consistory of the archbishop, the court of appeal from the diocesan courts of the province, and also a court of first instance

* Report of Eccles. Courts Commission, 1883.

in all ecclesiastical matters. The judge was the Official Principal; he held all the judicial powers of the archbishop and stood in relation to him as the Chief Justice did to the king, process issuing in his name. He also has the style of "Dean of Arches": originally the dean held a subordinate position, and then the two offices were merged.

The Court of Audience was the court in which such personal jurisdiction of the archbishop was exercised as was not exhausted by the appointment of the Official Principal. It is said to have had co-ordinate authority, and process issued in the name of the archbishop. It has been suggested that perhaps the foundation of this jurisdiction was legatine. It was presided over by the archbishop in person or by his vicar-general.

The Prerogative Court took the testamentary and matrimonial business till 1857. If the Official Principal did not sit, another judge took his place with the style of Master, Keeper, or Commissary.

The Court of Peculiars was a branch or an aspect of the Court of Arches, exercising jurisdiction originally over the thirteen London parishes which are exempt from the jurisdiction of the Bishop of London.

York.

In the province of York the Chancery Court corresponds to the Court of Arches, the Prerogative Court to the court of the same name in Canterbury.

The Bishop's Court.

The Diocesan Court was the consistory court of the bishop, and was held by the Bishop's Chancellor, or Official Principal. It took all ecclesiastical causes arising in the diocese. If the see was vacant, the archbishop through the vicar-general of the province presided.

The Archdeacon's Court.

The Archdeacon's Court originated in the functions of the archdeacon, which were at first purely executive. It was his duty to hold visitations in his district, inquiring, amongst other matters, into the condition of church fabric and church furniture.

But by degrees the archdeacons built up a customary jurisdiction of a more extended character, depending partly on usurpation, partly on varying agreements made with the bishops. The ruridecanal court, which was not strictly judicial, but was held preparatory to the visitation of the archdeacon, has become obsolete.

The procedure for over three centuries before the Reformation followed the forms of the Roman Civil Law.

The Jurisdiction of the Pope.—From the Archdeacon's Court appeal lay to the bishop, from the bishop to the archbishop, and according to foreign custom thence to the Pope. But the Pope was not merely the ultimate court of appeal, he was an omnicompetent court of first instance for the whole of Christendom, "dominus papa iudex est ordinarius singulorum," * and he could and did delegate his jurisdiction either generally or in particular cases; and in this country his delegates would be English ecclesiastics appointed by the papal rescript. In such a case the plaintiff applied to the Pope for a writ or *breve* just as in a secular matter he went to the king's chancery. Appeals to Rome were regarded by the kings with disfavour. The Constitutions of Clarendon † provided that appeals from the archbishop should lie to the King's Court for failure of justice, but the panic which attacked Henry after the murder of Becket made the provision a dead letter, and appeals to Rome went on as before. Henry III and Edward I both forbade their subjects to be cited out of the realm, statutes of præmunire penalised the practice, but appeals continued, till the Reformation, in those matters which lay outside the cognisance of the secular courts, viz. in testamentary and matrimonial causes.

The Canon Law was the traditional and binding law of the Church, liable to be altered by the Decretals of the Popes which were the statute law of the Church.‡

The Extent of the Spiritual Jurisdiction.

When the lay and spiritual courts became distinct, the Church claimed jurisdiction in two great classes of case: (1) where a clerk was accused of felony; (2) where the matter was of a spiritual nature.

The claim of the Church to try its felonious clerks produced

---

* And see Bracton, fol. 412 † Cap. viii.

‡ Maitland, *Canon Law in the Church of England.*

an extraordinary condition in the English criminal law, and is discussed in the following chapter.

Matters of Spiritual Nature.—The matters which the Church declared to be of a spiritual nature were numerous, and to one of its claims was directly due the difference in the devolution of real and personal property.

The Church courts assumed jurisdiction, with respect to churches, over patronage, furniture, ritual, and revenues; with respect to the clergy, over faith, practice, dress, and behaviour in or out of church; with respect to the laity, over morality, religious behaviour, marriages, legitimacy, wills, and administration of intestate estates. They also concerned themselves with the maintenance of doctrine, and claimed to examine into contracts where faith was alleged to have been pledged and broken, into oaths, promises, and fiduciary undertakings.*

The Executor.—The testamentary and intestate business fell into the ecclesiastical hands in the twelfth and thirteenth centuries. As freeholds could not be devised by will, the jurisdiction was restricted to chattel interests, and the competence of the church courts to compel the executor to carry out the testator's directions was conceded by the king's courts without difficulty and was firmly established before Glanvill wrote. The administration of intestate estates is closely connected with testamentary business, and naturally accompanied the testamentary jurisdiction.

The matrimonial jurisdiction rested on the sacramental and religious character of the ordinance, and was undisputed.

No objection was ever raised to the Church's jurisdiction over ecclesiastical offences committed by the clergy. With regard to the laity, the Church claimed the correction of sinners for their souls' health (*pro salute animæ*). So far as it dealt with such immorality as was untouched by the State, the claim was not seriously attacked before the Reformation. But the pretensions of the Church under this head included the cognisance of breach of contract, perjury, and slander, where civil remedies coexisted.

---

* In a book, now rarely to be bought, by Archdeacon Hale, containing precedents of criminal cases in the Consistory Court of London (1480–1639), we find *inter alia* the following topics dealt with: fornication, adultery, incest, bigamy, rape, sorcery, unseemly demeanour in church, absence from church, the marital relations, haunting taverns and keeping bad company, defamation, tale-bearing, administering goods without the ordinary's authority, destroying parish boundaries, practising as surgeon or midwife without licence, vexatious prosecution, not living in charity, and fox-hunting and fowling on Sundays.

These claims were maintained till the Reformation, and were regarded with much jealousy.* The jurisdiction was exercised under the visitatorial and penitential system, on an express complaint, the penalties imposed being penitential, but commutable for a money payment.

Heresy.—The grave offence of heresy was in the fourteenth century a novelty; and if we except the case of the unlucky deacon mentioned by Bracton, it seems that no penalty beyond excommunication could be enforced. But the canonists of the thirteenth and fourteenth centuries took their views of heresy from the Theodosian Code, which punished people such as Manichæans with death, and they contended that the ecclesiastical courts could convict for heresy, and that the civil power was bound to act as executioner. The common lawyers, however, stoutly resisted this encroachment.

The Writ "de heretico comburendo."—But on February 26, 1400, the king, *the temporal lords assenting*, issued a writ † for burning one William Sawtre, who had been convicted by the Provincial Council of Canterbury as a relapsed heretic.

A fortnight later, on March 10, 1400, the Statute 2 Hen. IV, c. 15, was passed, directing that obstinate and relapsed heretics should be burnt.

The Statute of Henry IV was reinforced by a severer statute in 1414,‡ and under it people were examined, punished, and burnt freely down to 1539, when the Act of the Six Articles § was passed, defining heresy, and punishing it with burning, imprisonment, and execution as a felon.

On the accession of Edward VI these statutes were repealed and the common law restored, but with the construction added that the writ *de heretico comburendo* existed *at common law*, and issued after conviction by a Provincial Council.

Mary re-enacted these statutes, Elizabeth repealed them, but established the Court of High Commission. Practically no notice was taken of any one but Anabaptists, *i.e.* Unitarians. These "wretches, abhorred in the eyes of all orthodox Anglicans," were tried and burnt under this supposed common law writ, the last execution of the kind occurring in 1612.‖

In 1640 the ecclesiastical courts fell, in 1661 the ordinary ecclesiastical courts were revived, but deprived of the *ex officio*

---

* *Constitutions of Clarendon*, cap. xv. † Rot. Parl. p. 459 a.
‡ 2 Hen. V, c. 7. § 31 Hen. VIII, c. 14. ‖ 10 Jac. I.

oath, and the law of heresy fell into a state of obscurity. In 1677 the writ *de heretico comburendo* was abolished by 29 Car. II, c. 9, the clergy being confined to the use of excommunication, deprivation, degradation, and other ecclesiastical censures.

"As a mere matter of legal theory," says Mr. Justice Stephen, "I know of no reason why any layman who is guilty of atheism, blasphemy, heresy, schism, or any other damnable doctrine or opinion should not be prosecuted in an ecclesiastical court and have penance enjoined; *e.g.* the public recantation of his opinions, and, on refusal, excommunication, and the court on that might direct imprisonment for not more than six months." *

The Reformation Period.

The Reformation marked a great change. The Church was now expected to enforce and did enforce the Statutes of Parliament. The canon law was permitted only in so far as it was not repugnant to the laws of the land.

The Statute of Appeals † forbade appeals to Rome: they went no further than the Court of the Archbishop.

The Act for the Submission of the Clergy ‡ disallowed any new canons made without the royal authority. The old canons were to be revised; till revision, all canons not repugnant to the law and the royal prerogative were to stand. The immediate result of this was the desuetude of the canon law, the universities ceasing to give degrees in it as a separate faculty. A further appeal was allowed from the archbishop to the King in Chancery: this court thus took the place of the Pope, and was popularly known as the *Court of Delegates*.

By the Statute of Supremacy § almost unlimited powers of ecclesiastical jurisdiction were assumed, and under it the supreme judicature of the king exercised through special commissions of visitation and jurisdiction, and "the obligation under which the bishops or some of them placed themselves by taking out commissions for the exercise of their ordinary jurisdiction, paralysed the working of the ancient courts." ||

The reign of Mary was retrogressive, but on the accession of

---

* Stephen, *History of the Criminal Law*, ii. 468.
† 24 Hen. VIII, c. 12. ‡ 25 Hen. VIII, c. 19.
§ 26 Hen. VIII, c. 1.
|| *Report of Ecclesiastical Commission*, xxxiii, sq.

Elizabeth the royal jurisdiction in matters ecclesiastical was immediately restored. The Act of Uniformity,* while providing process before lay tribunals, recognised and confirmed the power of the Ordinary to reform, correct, and punish by censures of the Church all offenders against the provisions of the Act. The joint effect of the Marian and Elizabethan legislation was that the authority under which the ordinary courts were held was that of the archbishops, bishops, and ordinaries.

The Law of the Church.

As the canon law had never been revised, it remained in force so far as it was not contrary to the law or the royal prerogative, and such canons and the king's ecclesiastical laws were concurrently administered by the ecclesiastical courts. To this body of law were added, canons made in convocation with royal sanction, royal proclamations, injunctions, and advertisements issued in virtue of the royal supremacy or under the Act of Uniformity.

The ecclesiastical jurisdiction of Elizabeth was exercised by :

1. The old courts, administering the ancient law modified as above stated.
2. The Court of High Commission.†
3. The Court of Delegates.‡

The Court of High Commission.

By 1 Eliz. c. 1 the Crown was empowered to issue commissions for the purpose of correcting all manner of errors, heresies, schisms, abuses, offences, contempts, and enormities. Under the statute temporary commissions were at various times appointed. Five altogether issued during the first twenty-five years of Elizabeth's reign.

In 1583 a permanent court was established of forty-four persons, twelve being bishops, and three making a quorum. Under the general words of the statute it exercised almost despotic powers of fining and imprisoning, even for offences of by no means spiritual cognisance. It was as arbitrary as any lay court, as inquisitorial as any ecclesiastical court. It was inferior to the Roman Inquisition in having no power to kill or torture. It was for suitors a court of first instance, and was open to informers of

---

* 1 Eliz. c. 1.

† Created under 1 Eliz. c. 1, § 18.

‡ 25 Hen. VIII, c. 19.

every class; it proceeded on suspicion, information, presentation, or inquiry; and except for a short time under James I, it was subject to no appeal. It did not, however, supersede the courts of the Ordinary, but exercised concurrent jurisdiction. While there is sufficient evidence of jurisdiction exercised by it in doctrinal and disciplinary matters, the largest proportion of offences comes under the head of misconduct and immorality, both of clergy and laity, and of proceedings in recusancy and nonconformity. The *ex-officio* oath was largely used, and twenty-four interrogatories of the most stringent type were drawn up and were administered to every "suspect" clergyman. Not only his public proceedings but his private conversation was investigated. If he declined the *ex-officio* oath, he was deprived and imprisoned for contempt.

The court was abolished by 16 Car. I, c. 11, and any new commission forbidden by 13 Car. II, c. 12. Nevertheless James II tried to revive it under the name of the "Court of Commissioners for Ecclesiastical Causes": it was to consist of three clerics and four laymen, and Jeffreys was to preside. But James' reign came to a sudden end, and his attempt was declared illegal by the Bill of Rights.

The Court of Delegates.

The powers of this court were full and final: it carried the full judicial authority of the Crown, and from it there was no appeal.

The delegates could not hear appeals from the Court of High Commission, but from the ordinary courts could take appeals on all matters, cognisable therein, with the possible exception of heresy.

Its Composition and Abolition.—The Delegates were to be "such persons as shall be named by the king's highness." Doctors of the civil law were always employed in conjunction with bishops or judges. The bench was made up from a rota of D.C.L.'s and the common law puisne judges. "The judges in the Court of Delegates did not publicly assign the reasons of their sentence, but in deliberating on their judgment they assigned their reasons to each other and in the presence of the registrar."

In 1830 this court was made the subject of a Royal Commission, which reported in 1832. No substantial charge of injustice or excess of powers could be laid against it, though its proceedings were somewhat expensive and dilatory. "We are

informed that it seldom reversed the judgments of the provincial courts; that it was so far as the civilian element went frequently composed of junior and inexperienced doctors; that its proceedings were undignified, especially the mode of payment (a guinea a day paid by the victorious party at the close of the cause to each of the judges). The fact, moreover, that the reasons for the judgments were not given seems to have been regarded as infusing an element of uncertainty as to the nature of the law administered by the court." * The learned witnesses who appeared before the Commission were, however, unable to suggest anything more satisfactory.

In consequence of the report the court was abolished for almost all purposes by 2 & 3 Will. IV, c. 92 (the exception being the recourse allowed to the Delegates by the patent of a colonial bishop), and its powers transferred to the King in Council, and by 3 & 4 Will. IV, c. 41, went to the Judicial Committee of the Privy Council, further regulations being made by 3 & 4 Vict. c. 86, §§ 15, 16, and 6 & 7 Vict. c. 38.

Appellate Jurisdiction Act.—The Appellate Jurisdiction Act of 1876 restored to the Privy Council the jurisdiction which had for a time been menaced by the Judicature Act, 1873, and it was provided that a number of archbishops and bishops, to be appointed by Order in Council (five being subsequently the number fixed upon), should sit as assessors to the Judicial Committee.

---

* *Report of Ecclesiastical Commission*, 1883.

CHAPTER XXII

THE CLERK

The Criminous Clerk.—Three persons were in different degrees outside the Common Law : the Clerk, the Merchant, and the Jew. On the severance of the jurisdictions the Church claimed the right to try all cases in which a " clerk " was accused. Although this expression is wide, *clerici rettati et accusati de quacunque re*,* the claim, in fact, was only pressed with regard to " felonies," as the king reserved cases of high treason ; † while of smaller offences, " transgressions," the Church took no account, perhaps because they did not involve the consequences on conviction of death, mutilation, or escheat.‡

This claim, which for a time was successfully made, produced some curious consequences in the sphere of the English Criminal Law.

It may be useful here to make two statements which I think are accurate. Down to the year 1826 § treason and all felonies, except petty larceny and mayhem, were punishable with death. All felonies, except *insidiatio viarum et depopulatio agrorum*,‖ were " clergyable " unless taken out of the benefit by statute.

Benefit of Clergy.

The Earliest Practice.—The story of " benefit of clergy " is not easy to tell, for the authorities are rather difficult to under-

---

* *Constitutions of Clarendon*, c. 3.

† Hale, ii. 350; and cf. 25 Edw. III, st. 3, *de clero*.

‡ This exemption of ecclesiastics from the secular jurisdiction did not originate in William's ordinance. It had been long the practice for men in orders when accused to clear themselves in a way not available for laymen, *e.g.* the corsnæd was reserved for them : and if they went to compurgation they had fellow priests for compurgators.

§ 7 & 8 Geo. IV, c. 26.

‖ Hale, ii. 333.

stand. But it seems hardly possible to doubt that the construction placed by Professor Maitland * on the famous third chapter of the *Constitutions of Clarendon* is correct. The accused clerk is to be summoned to the King's Court to answer, thence he is sent to the Ecclesiastical Court, which, if he is convicted, will degrade him. He is then no longer a clerk, and he will be tried and punished in the King's Court as a layman. An official of the royal court will attend the Ecclesiastical Court to see that he does not escape. This view, which seems agreeable to the Canon Law, was opposed by Becket on the ground that by this procedure the man was punished twice over, which was unjust, "nec enim Deus iudicat bis in idipsum." †

Its Modification.—The view of Becket would seem to have prevailed after his death.

According to Bracton,‡ "when a clerk of whatever order or dignity is taken for the death of a man or any other crime and imprisoned, and an application is made for him in the Court Christian by the ordinary," the prisoner must be immediately given up without any inquisition being taken. He must be kept in prison till he has duly purged himself, and if he fails to do so he shall be degraded.

Bracton lays it down that even in murder the king's justices could not try clerks till degraded, and as the King's Court could not degrade them, they must be handed over to the bishop. Degradation, he proceeds, is sufficient punishment, *quæ est magna capitis deminutio;* but on the graver charge of apostasy, a man was degraded and *statim fuit igni traditus per manum laicalem.*§

Canonical purgation proceeded as follows: the prisoner was tried before the bishop or his deputy and a jury of twelve clerks. The prisoner first swore to his innocence, and twelve compurgators swore that they believed him; the evidence on oath was taken, *but only on behalf of the prisoner;* the jury of clerks found their verdict on oath, and the prisoner was usually honourably acquitted.

---

* *Canon Law in the Church of England*, pp. 132 *sq.*

† Some ecclesiastics had been accused of irregularities, including rape and murder. A canon had spoken ill of the king's Justiciary. They had been found guilty in the Court Christian, but the king thought the penalty inadequate, and desired a secular punishment.

‡ Bracton, *De Cor.* II, c. ix. p. 298.

§ This was the case of the unfortunate deacon "qui se apostatavit pro quadam Iudæa." This was no doubt an aggravating circumstance, for Fleta, i. c. 35, regards connexion with a Jew or a Jewess as partaking of the nature of bestiality. That sort of person is to be buried alive.

Should it happen that he was convicted, he might be degraded, or put to penance, whipped, or imprisoned, but the Church could not pronounce a sentence of blood.

The practice in cases of this nature underwent considerable change, but in the second stage of development it seems that if a clerk committed a murder, the sheriff arrested him. If his bishop desired he could demand him, in which case he was bound to keep him in custody, and to produce him *sub pœna centum librarum* before the justices in eyre, when they next came. In the thirteenth century, the clergy complained that this practice kept them years in prison. When the justices at length come, the prisoner is produced and declines to answer, saying that he is a clerk, and the bishop's official demands him. He is handed over, and the justices have no further concern with him.

Secular Interference.—But late in Henry III's reign, and certainly early in Edward I's, the practice has changed. Sir Edward Coke attributed the change to a construction placed upon the Statute of Westminster I, c. 2; but the statute says nothing expressly on the subject, and perhaps it was appealed to in order to confirm an existing practice. Whatever the authority was, the principle was now recognised that the truth of the charge ought to be investigated by the country and not by a partial tribunal. Accordingly the twelve jurors and the four townships were summoned to say in what character (*qualis*) the prisoner was handed over to his bishop, *i.e.* guilty or not guilty. This process is not Trial in the proper sense of the word, for the prisoner was not called on to plead. It is an inquisition *ex officio*. And according to Hale * an inquisition might be taken on the question whether he was a clerk or no. The inquisition was taken after indictment, that being the moment at which the bishop's claim was usually made. If the inquisition pronounced him guilty, he was handed over to the bishop, but his goods and chattels were forfeited, and his lands seized into the hand of the king till the result of the trial in the Bishop's Court.

This method was, or was alleged to be, a great disadvantage to the prisoner, for in an inquisition *ex officio* he was unable to challenge the jury, and besides, he might possibly be acquitted of the felony if he could put himself on the jury *de bono et malo*, and take his chance.

Accordingly in Henry VI's reign, on the ground that it was

---

* Hale, *P. C.* ii. 377 *sq.*

better for the prisoner to claim his clergy after conviction, he was usually directed to plead to the felony, and put himself on the country. He could thus challenge the jury, have a chance of acquittal, and if found guilty then claim his clergy.

If the clerk cleared himself in the Bishop's Court, he had restitution of his lands, of which the king in the meantime had been taking the profits. But with regard to his goods, a difference was made. If the prisoner claimed and got his clergy on arraignment, that is before conviction, as was the old practice, then if he made his purgation, he had a writ to the sheriff to restore his goods. If, however, he pleaded to the felony, which was the new practice, and stood his trial before the justices, and was convicted, his goods were forfeited irretrievably. The new practice inaugurated in tenderness for the prisoner's interests, undoubtedly benefited the royal revenue.

The justices, moreover, had a discretion; they could hand the convicted clerk over *absque purgatione*, which meant that he was not to be allowed to make his purgation, but was imprisoned in the bishop's prison for life. In that case the king not only had his goods but the profits of his lands during his life.

Extension of Privilege.

The privilege was originally confined to those persons who had "habitum et tonsuram clericalem," but by the statute *De clero* * clerks, secular and religious, convicted before the secular justices of treason or felony *touching other persons than the king* or his royal majesty, were allowed the benefit. The expression "secular clerk" included doorkeepers, readers, exorcists, and subdeacons; and then the courts gradually extended the rule to all who could read, although in the reign of Edward II we find that one Shardelowe, subsequently a judge, said "literatura non facit clericum nisi habet sacram tonsuram." † But by the time of Edward IV the court gave clergy, if the case was clergyable, even though the prisoner had no tonsure, if he could read, and though the ordinary refused him.‡ This official seems to have sat regularly in court, and to have claimed his men "of course"; he was, at first, the only judge of their competency when the reading test was introduded, but the court soon took the view that the

---

* 25 Edw. III, st. 3. † 26 Ass. 19; 20 Edw. II.
‡ Y. B. 9 Edw. IV, 28 b.

ordinary was but the minister of the court, and if he happened to be absent, the court could give the prisoner his book and hear the man read, even though the ordinary had made a return *non legit*. It appears, though this point is rather obscure, that if a prisoner claimed his clergy on arraignment and read, he went to prison, even if the ordinary did not claim him ; but if he put himself on the country *de bono et malo*, and if after conviction the ordinary would not claim him, he was hanged.* Women were excluded from the benefit till 4 W. & M. c. 9 : so also was the "bigamus," that is, "one who hath married two wives or one widow." He was relieved from his unfortunate position by 1 Edw. VI, c. 12.

Change in Character.—Henry VII took the benefit away from certain offences. The distinction now becomes one between offences and not between offenders—some felonies were clergyable, some were not—and the list was further curtailed by Henry VIII.

The Reading Test.—The reading test,† which once sifted out the clerks, now let in the layman. The practice was for the court to refer the prisoner to the ordinary, who certified whether he could read, and if he could, he had the benefit.

In 1487 by 4 Hen. VII, c. 13, every one convicted of a clergyable felony shall be branded on the brawn of the thumb with M if it is murder, with T if it is theft. If any claimed clergy a second time, he should be denied, if not actually in orders, or if he could not produce his letters of ordination or a certificate from the ordinary.

By 18 Eliz. c. 7, it was enacted that persons admitted to their clergy shall not be delivered to the ordinary (purgation having in the meantime been abolished), but after clergy allowed and burning in the hand shall be set at liberty ; but the justice may, as further correction, imprison them for a period not exceeding one year. The burning was to inform the judge whether the prisoner had had his clergy before. We have (preserved in Mr. Baildon's book) a charge delivered June 3, 1595, *in camera stellata*, by the Lord Keeper to the Justices of the Peace living in or near London, "devised by the Queen herself," which states *inter alia* that benefit of clergy is not to be allowed more than once, nor in

* 12 Ass. 15, 39; 27 id. 42.

† It became usual at some period to test a prisoner's clerkly powers by giving him Ps. li, v. 1 to read and translate. A prudent and unlettered felon might establish his claim to benefit of clergy, by learning this so-called "neck" verse by heart.

cases where it is not allowable by law, "for it is no pietye but wicked pitye."

By 5 Anne, c. 6, the necessity for reading was abolished.

By 4 Geo. I, c. 11, larcenies might be punished with seven years' transportation instead of branding.

By 19 Geo. III, c. 74, branding was practically though not expressly abolished.

Abolition.—By 7 & 8 Geo. IV, c. 28, benefit of clergy was abolished. So that, to quote Mr. Justice Stephen, at the beginning of the eighteenth century the position was :—

All felonies were either clergyable or not.

Every one charged with a clergyable felony could have benefit of clergy for the first offence, and clerks in orders had it for any number of offences.

The benefit gave immunity from capital punishment, but till 1779 the prisoner was branded, and sentenced besides to one year's imprisonment, or in a larceny to transportation for seven years.

The number of felonies at common law was small, and all with the exception of petty larceny (*i.e.* of goods value less than 12*d.*) and mayhem were punished with death.

So till 1487 any one who could read might commit any number of murders without any other penalty than that of being delivered to the ordinary to make purgation, unless he was delivered *absque purgatione.*

After 1487 any one who could read could commit murder once without any punishment except branding, and if a clerk in orders he could till 1547 commit any number of them without being branded more than once.

Sanctuary.—Connected with benefit of clergy was the Law of Sanctuary. Every consecrated church was sanctuary. The malefactor who took refuge there could not be extracted, but it was the duty of the four neighbouring towns to beset the holy place and send for the coroner. He came, parleyed, and gave the criminal the choice of standing his trial or confessing and abjuring the realm. If he chose the latter he hastened in pilgrim's dress to the port assigned, and left under oath never to return. His lands escheated and his goods were forfeited. If he would do neither, the legal view was that he might after forty days be starved into submission.*

---

* Pollock and Maitland, ii. 590. There is a picturesque case in *Rot. Cur. Reg.* i. 69, 95, where William FitzOsbert, who was a troublesome character,

Abjuration became obsolete, but various places came to be privileged, and "sanctuary men" were allowed to live there even under statutory regulations.*

Sanctuary was abolished by 21 Jac. I, c. 28, but in defiance of the law lingered on for another century, and was a protection at any rate against the execution of civil process; for there is an Act 8 & 9 Will. III, c. 27, making it penal in sheriffs not to execute their writs in "pretended privileged places," such as Whitefriars and the Savoy.†

---

had behaved very badly to his brother Robert, and, in the absence of Richard I, posed as a patriot leader in the City of London. On being deserted by his followers, he fled to the church of St. Mary le Bow, and went up the tower. The Justiciar, who, unfortunately for William, was archbishop, had no scruples, disregarded the sanctuary, ordered the tower to be set on fire, smoked William out, caught him, had him tried by the Proceres, dragged him to Tyburn, and hanged him. But this conduct was considered unseemly even in an archbishop, and led to his retirement.

* See 27 Hen. VIII, c. 19; 32 Hen. VIII, c. 12.

† Stephen, *H. C. L.* i. 491 *sq.*

CHAPTER XXIII

THE EARLY HISTORY OF THE LAW MERCHANT

THE materials necessary for a full account of the legal position of the merchant are unfortunately scanty. In virtue of his calling he had the right to be judged by a law different from the common law. He did not much resort to the King's Courts, and the local records, such as those of the Piepoudre Court of Bristol, the great western port of the kingdom, have most unfortunately been lost or destroyed.

Early Mercantile Law was International.—And yet by piecing together fragments of evidence collected here and there, we can arrive at an opinion to the effect that there was a body of mercantile law, affected to some extent by local variations, especially in procedure, recognised in this country and in the ports of Europe, and administered there and here in courts of similar character supported by the royal authority.* It was really Law, and it was really International. The history of the law merchant in this country can shortly be stated. It was from the first administered in local and popular courts of *mercatores et marinarii*,† and was intimately connected with the King in Council. There is statutory recognition of this connexion in the Statute of the Staple.‡ The Court of Admiralty after a struggle usurped the jurisdiction, the Common Law Courts in turn destroyed the Admiralty jurisdiction by repeated prohibitions, while the merchants, dissatisfied with the illiberal policy of the common lawyers, might have resorted to the Courts of Chancery, whose doctrines

* So Edward I, in the *Carta Mercatoria* :—"et si forsan super contractus huiusmodi contentio oriatur, fiat inde probatio vel inquisitio secundum usus et consuetudines feriarum et villarum mercatoriarum, ubi dictum contractum fieri contigerit et iniri." (*Munim. Gild.* II, i. p. 206.)

† Cf. the case of the ship of Placentia (Cor. Reg. Trin. 18 Edw. II, Rot. 18.

‡ 27 Edw. III, st. 2, c. 21.

and practice were very similar to their own, had not Lord Mansfield appeared to create the mercantile law of this country.

The nature of the law merchant has been stated by the most eminent authorities. Lord Mansfield said "the maritime law is not the law of a particular country but the general law of nations," * and "the law of merchants and the law of the land is the same." † And other judges used similar language.‡

The *lex mercatoria* interested two kinds of people, the *mercatores* and the *marinarii*. "As the roundness of the globe of the world," says Malynes, "is compounded of the Waters and the Earth, so this work of the Law Merchant cannot be compleat without the Sea Lawes." § As to what the sea laws were, there is I think no shadow of doubt. Amongst the collections of Dooms, and the Custumaries of maritime law, indeed the basis of many of them, the so-called laws of Oleron, stand pre-eminent.

The Laws of Oleron.—On the continent of Europe we find a French Ordinance of Charles V (1364) || admitting the Castilians to trade in Normandy "selon les Coustumes de la Mer et les droiz de Layron dehors"; and in the Ordinance of the same king on the rights and pre-eminences of the Admiral of France we have "ledit Admiral doibt administrer justice a tous marchans sur la mer selon les droitz, jugemens coustumes et usaiges d'Olleron." ¶ There is besides a tradition in a MS. in the Royal Library in the Escorial, that the rolls of Oleron were adopted in Castille by

---

* *Luke* v. *Lyde*, 2 Burr. 887.

† *Pillans* v. *Van Mierop*, 3 Burr. 1669.

‡ "This custom of merchants is the general law of the kingdom, part of the common law, and therefore ought not to have been left to a jury after it had been already settled by judicial determination" (per Foster, J., *Edie* v. *E. I. C.*, 2 Burr. 1226). "The custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice, and if any doubt arise to them about their custom they may send for the merchants to know their custom, as they may send for the civilians to know their law" (per Hobart, C.J., *Vanheath* v. *Turner*, Winch. 24). "The law of merchants is *ius gentium*, and the judges are bound to take notice of it" (*Mogadara* v. *Holt*, Show. 318). "We take notice of the laws of merchants that are general, but not of those that are particular usages" (per Holt, C.J., *Lethulier's case*, 1 Salk. 443). "When the custom has been judicially ascertained and established it becomes part of the Law Merchant which the courts are bound to know and recognise" (per Lord Campbell, *Brandao* v. *Burnett*, 12 Cl. & F. 787). "A system of equity, founded on the rules of equity, and governed in all its parts by plain justice and good faith" (per Buller, J., *Master* v. *Miller*, Smith's L. C. i. 856).

§ *Lex Mercat.* 87.

|| *Bl. Bk. of Admiralty* (Rolls Series), i. lxiv. n.

¶ *Ibid.* i. 448.

Alphonso X in the thirteenth century as positive law in suits between merchants and mariners, and that the laws in the fifth Partida of that body of Castilian law known as the Siete Partidas were framed in accordance with the rolls.*

There is sufficient evidence of the authority of those judgments in this country. In the archives of the city of London there are two MSS., one called the Liber Horn, the other the Liber Memorandorum. The Liber Horn is attributed to Andrew Horn, who was City Chamberlain during the reign of Edward II, and died in 1328. It contains a copy of the laws of Oleron. The Liber Memorandorum of the Corporation contains various ordinances and charters, none later than 15 Edw. II, and in the middle, preceding some charters of William the Conqueror, which are there stated to have been copied in 1314, is another copy of the laws. In the records of Bristol, the great port of the West of England, there is another copy dating from the fourteenth century. From these facts we may draw the inference that the copies were kept for the purposes of reference and use. But we need not be contented with inference.

There is extant a judgment of the mayor and bailiffs of Bristol, that the master of a ship is liable for loss of cargo by the theft of the crew, and certified by them to the Chancellor as based on the *lex et consuetudo de Oleron.* This case, *Pilk* v. *Venore*, was originally tried "in plena curia coram maiore et ballivis et aliis probis hominibus villæ et magistris et marinariis," and both plaintiff and defendant pleaded the *lex de Oleron*, saying, "talis est." †

The inquisition taken at Queenborough by command of Edward III, in the forty-ninth year of his reign, directed, amongst other things, inquiry to be made "about all mariners who lay violent hands upon or beat their masters against the laws of the sea and the judgement of Oleron made thereon," and also "concerning all mariners who are rebellious against the honest commands of their masters, and of masters who do not keep their mariners quiet at table or elsewhere, as the judgements of Oleron do require." ‡

In a fifteenth-century case heard in the Court of Admiralty, a master of a ship was tried for cruelty to a seaman according to the law of Oleron.§ And in 1402, in the fourth year of Henry IV,

---

* *Bl. Bk. of Admiralty* (Rolls Series), i. lxvii.

† Transcribed by Prynne (*Animad.* 117) from the records in the Tower. (*Brevia Regis*, Tr. An. 24 Edw. III, nu. 44, Bristol.)

‡ *Bl. Bk. of Admiralty*, i. 161.

§ *Ibid.* i. 255.

Parliament petitioned "Que les Admirals usent leur leies tant solement per la ley de Oleron et anxiens leyes de la mere et per la ley d'Engleterre et nemy per custume." *

Their Subject-matter.—We know what the judgments of Oleron contained. They are judgments as to the power of the master to engage part of the ship's furniture, and to sell merchant's goods to raise funds for necessary expenses, his duties to all concerned in case of wreck, his treatment of sick mariners, his duty to jettison, accidental collisions in a roadstead and anchorage therein, wages and perquisites of mariners, claims against the merchant for not providing, and against the master for not taking cargo, the time when freight is payable, the master's lien for freight, what is liable to contribute to a jettison, and the liability of pilots.

There is one instance in which a successful appeal was made to the Crown against the rule of the judgments. In 1285 Edward I gave judgment † on a complaint by the barons of the Cinque Ports, that the merchants of Gascony, England, Wales, and Ireland were compelling the English shipowners to contribute for jettison on vessel, apparel, and stores. Edward directed that only merchandise should contribute, thus overruling the judgments of Oleron ‡ and the Roman law rule, and his judgment was apparently afterwards followed in the Mayor's Court at Oleron.§

No code of the rest of the *lex mercatoria* is extant, but some of its features are known, and it is hardly possible to doubt that it was a definite body of customary law recognised here and on the continent. Not only do enactments like the Statute of the Staple ‖ and the *Carta Mercatoria* ¶ speak of it as an entity distinct and intelligible, but what we know of the character of the tribunals who administered it supplies an irresistible argument. These tribunals were lay and not professional; they were not national, for they might be mixed. The men who formed part of a market court at Antwerp might in six months be doing the same thing at St. Ives. This is beyond question, for the *Carta Mercatoria* provides that in all cases except capital a foreign merchant is to have if possible a *medietas de eisdem mercatoribus;* and the Statute of the Staple directs not only that where two strangers are parties the inquest is to be made up of strangers, and if one stranger then

---

* Rot. Parl. 3, 498.
† *Munim. Gild.* (Rolls Series), i. 490. Rymer, *Foed.* A.D. 1285.
‡ *Bl. Bk. of Admiralty*, i. 97, Art. 8.
§ *Ibid.* ii. xxxiii. *Ibid.* 395. Coutumier of Oleron, c. xciv.
‖ 27 Edw. III, st. 2. ¶ 31 Edw. I. *Munim. Gild.* ii. 205.

a jury *de medietate*, but that in every staple * there shall be a mayor having knowledge of the law merchant elected by strangers as well as denizens, two "conveniable" constables chosen by the merchants, and two merchant aliens to be associated to the mayor and constables to hear the plaints of merchant aliens. The international character of the tribunal makes it certain that the law administered was international too. There is a very interesting entry illustrating this point in the Manorial Pleas published by the Selden Society,† viz. a summons to all the merchants of as many communities as there were present at the fair of St. Ives, A.D. 1275,‡ to present themselves on the morrow *coram seneschallo* to consider and see that four merchants have justice and equity, inasmuch as their servant had been caught measuring canvas with a false ell and selling it. Of these *communitates* § certainly one came from Ypres. It is alleged also || that King Amauri I, who succeeded his brother Baldwin as King of Jerusalem in 1162, established a special Court of the Sea, and also a mercantile court, *la Cort de la fonde*, consisting of a royal bailiff and a mixed jury of four Syrians and two Franks. We may believe that, wherever the court was held, the law, allowing for procedural variations, was the same. The same people met each other in succession at the great fairs, where the same questions must have constantly arisen, and it is incredible that they would have administered a system in which their rights varied with the locality, they themselves being both litigants and judges. Owing to the exigencies of trade, merchants, of all men, require that the law should be known with precision. To the great fairs such as those at Lyons, Besancon, Antwerp, Winchester, Stourbridge, and St. Ives, merchants came from afar.¶

* The staple towns were Newcastle, Lincoln, York, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter, Bristol, Carmarthen, Devylen, Waterford, Cork, and Drogheda (27 Edw. III, st. 2).

† *Select Pleas in Manorial Courts*, i. 153.

‡ This fair belonged to the Abbot of St. Ives, and the court was presided over by his steward, but the merchants were the *pares curiæ*.

§ A *communitas* was an association in which every individual guaranteed the trade debts of every other, "his peer parcener and commoner." See the remarkable case at the same fair (*Manor. Pleas*, i. 152), where the plaintiff, *B.* of Bordeaux, complains of *C.* and *D.* of Norwich, the *pares participes et communares* of *R.* and John his son, that the said *C. D. R.* and *J.* unjustly deforce him of £8 which they ought to pay "eidem *B.* vel cuicunque de suis scriptum obligatorium inter ipsos confectum portanti" on Midsummer Day, 1274, for wines sold by *B.* to *R.* and *J.* at the fair at Boston on Friday before St. James' Day, 1273.

|| *Bl. Bk. of Admiralty*, iv. xvi.

¶ We may notice the regulations on the "Feste de Pui," a society of

The courts were "popular," judgment being given by those who knew the customs, whether they were *prudhommes* at Oleron or Barcelona,* or *mercatores et marinarii* sitting on Bristol quay,† or merchants in a Court of Piepoudre. "Popularity" is, however, not peculiar to mercantile courts, but was common to all early local courts, such as the Manorial Court and the Sheriff's Court in this country.

The Piepoudre Court.—The name Piepoudre was frequently given to those courts which were attached to fairs "to determine the plaints of persons passing through who cannot make any stay there; such persons, that is to say, as are called pepoudrous." ‡ These courts were of record, and if the fair was a franchise of some lord the court was held before the lord's steward.§ If not a franchise fair, the court, like other mercantile courts, was held before a mayor and two coadjutors. In a great city like London the mayor was probably elected by the *communitas* of London; || in the staple towns, according to the Statute of the Staple, the foreign merchants had votes. So a Piepoudre Court could be held by special custom before the mayor and two citizens. The case of *Goodson* v. *Duffield* ¶ was a proceeding in error on a judgment in the Court of Pie Powder at Rochester, in which it was said that these courts are held in divers cities, as in Bristol and Gloucester. And here the record was "Curia dom. regis pedis pulverisata (*sic*) tent. apud civitat. Roffens. coram maiore et duobus concivibus secundum," etc. There was such a court also at the fair at Stourbridge, which belonged to the Corporation at Cambridge,** and this was held before the mayor and bailiffs of Cambridge.

---

foreign merchants, "that mirthfulness, peace, uprightness, gaiety, and good love may be maintained," in which we find "e pur ceo qe la feste du Pui est mut honore par la venue des compaignons, e tuit lui pluis de la compaignie sont marchantz hauntaunz les feires," so that they cannot come to London on the fixed day of the great feast, "le quel jour ceo est duraunt le feire de Sainte Ive et autres feires," the day is to be altered. (*Munim. Gild.* ii. 228.)

* In *The Ordinance of Maritime Police*, published by James I of Arragon (1258), the Corporation of the Prudhommes of the Strand at Barcelona is spoken of as a council of administration of maritime matters of co-ordinate authority with the king himself. (*Bl. Bk. of Admiralty*, ii. lxvii.)

† *Bl. Bk. of Admiralty*, i. 378.

‡ *Liber Albus*, ed. Riley, 59. § Y. B. 6 Edw. IV, 3 b.

|| The terms "mayor" and "communitas" go together. (Stubbs, *Sel. Ch.* 308.)

¶ Cro. Jac. 313, 2 Bulst. 21, and cf. *Howel* v. *Johns*, Cro. Eliz. 773.

** Dyer, 132, 6, pl. 80.

The Gild Merchant.—In connexion with this popular or lay character of mercantile justice we may notice the institution known as the Gild Merchant, which seemingly was an association for the purpose, amongst others, of mutual arbitration. Members of the same gild were bound to bring their disputes before the gild before litigating the matter elsewhere. This function of the gild merchant was recognised by the kings. The great Gild of St. John of Beverley * of the Hans House held charters from the Archbishops of York, with the royal licence of Henry I, granting to the town burgesses a gild merchant and the right of holding pleas among themselves, and this grant was confirmed by an *inspeximus* charter of Richard II in 1379. The city of York † has a charter of John, dated 1200, giving a gild merchant with the liberties pertinent; and in 1581 the queen, in consideration of the losses and decay of merchants, allowed the merchants there to elect a governor and eighteen assistants, with power, *inter alia*, to try all suits among its members or between the latter and others.‡

What may have been the relations between the merchants and the Crown under the Norman and early Plantagenet kings we have at present no means of knowing, but judging from the hardness of the task of consolidating the common law, it may be well that this outlying portion was left to itself for the time being. In any case Edward I made the connexion firm. The foreign merchant was a person to be considered and treated tenderly, for with him the king could bargain directly as to customs without the intervention of Parliament, and money was never too plentiful, and in return the king gave him his support against the "rings" or "trade unions" of the English merchants, and made himself the final Court of Appeal.

For eight hundred years merchants have cried for speedy justice. Mercantile men must be about their business, for trade will not wait. Once, the merchant was here to-day and gone to-morrow; now, he will sooner cut his loss than have his case hung up indefinitely; if he cannot get king's justice he will go to arbitration. In a report drawn up in the reign of Henry II on the "customs" of Newcastle-on-Tyne, as they existed *temp.* Henry I, the following sentence appears: "Inter burgensem et

---

* *English Guilds* (Brentano), 150. † *The Gild Merchant* (Gross), ii. 279.

‡ In a charter to the city of London (52 Hen. III) it is granted to the citizens not to plead without the walls, except (*inter alia*) to pleas concerning merchandise, which are wont to be decided by Law Merchant in the boroughs and fairs by four or five of the citizens there present. (Norton, *Comm.* 416.)

mercatorem si placitum oriatur, finiatur ante tertiam refluxionem maris," which indicates a mercantile court doing speedy justice.* In the Doomsday of Ipswich,† which is a recension of the old book of the second year of John, and drawn up in the nineteenth year of Edward I, it is stated that whereas pleas between persons sitting and dwelling in the town should be pleaded "by two days in the week," the merchant stranger was treated with the greater consideration which seemingly was everywhere shown to him :

> "The plees betwixe straunge folk that men clepeth pypoudrous, shuldene ben pleted from day to day . . . The plees in tyme of feyre betwixe straunge and passant shuldene bene pleted from hour to hour . . . and the plees yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that abydene not but her tyde, shuldene been pleted from tyde to tyde."

Among the questions put to the citizens of London on the Iter held by Hubert de Burgh and his associates ‡ and the answers thereto,§ we note the following :

> *Q.* 9. "May the Bailiffs (these are afterwards called Sheriffs) of the city determine the plaints of persons passing through the city who cannot make any stay there, such persons, that is to say, as are called pepoudrous as to debts due or injuries done, or must they await the sitting of the Hustings ?" ||
>
> *Ans.* "It is answered that of usage such pleas are not holden out of the Court of the Hustings. But it is further provided and agreed that in future the mayor and sheriffs, assisted by two or three aldermen, shall hear such plaints and that immediately from day to day."

In the Ordinances ¶ which Edward I made when he took into his hand the franchises of the city of London is the following :

> "And whereas the king doth will that no foreign merchant shall be delayed by a long series of pleadings, the king

---

* Stubbs, *Sel. Ch.* 112. So Bracton, l. 5, f. 334 a, "Item propterea qui celerem debent habere iustitiam, sicut sunt mercatores quibus exhibetur iustitia pepoudrous."

† *Bl. Bk. of Admiralty*, ii. 23. ‡ 5 Hen. III. § *Liber Albus*, 55.

|| "Et husting sedeat semel in hebdomada videlicet die Lunæ." (Carta Civ. Lond., *Sel. Ch.* 108 (*temp.* H. I.).)

¶ *Liber Albus*, 257.

doth command that the Warden or Sheriffs shall hear daily the pleas of such foreigners as shall wish to make plaint . . . and that speedy redress be given unto them."

Not only was the king doing his best to get the merchant speedy justice, but he also invited him to regard the King in Council as the ultimate fountain of justice. The Statute of the Staple * is an epitome of the royal policy in this regard. The king's judges are not to take cognisance of things touching the staple (§ 5). This is the province of a lay tribunal elected by the merchants, who are to apply the law merchant and not the common law (§ 21). Merchants are to have right done them from day to day and from hour to hour (§ 19). In case of doubt the matter is to be shown to the Council, or if any merchant complains of want of justice it shall be redressed by the Chancellor and Council without delay (§ 21).

There are two celebrated cases which found their way to the king. The first was the case of Simon Dederit of Guynes † (a foreigner, it will be noticed), which came from the great fair at St. Ives on a point of mercantile law, and shows the carefulness of the tribunal. This was an appeal to the *Dominus Rex* at Westminster, "et prædictus Simon dicit quod lex mercatoria talis est in omnibus at singulis nundinis per totum regnum. Paratus est verificare." His opponent denies this, and the sheriffs of London, Lincoln, Winchester, and Northampton, are each directed to produce before the king twelve good and lawful merchants to recognise, etc. In the second case ‡ a merchant stranger complains before the Chancellor and judges in the Star Chamber. He had come into this country on a safe conduct, and his goods had been stolen at Southampton.

The Law Merchant and the Chancery.—The Chancellor said that such a person was entitled to sue here according to the law of nature in the Chancery, that is the law merchant, which is law universal throughout the world.

"Cest suit est pris par un marchant alien que est venus par safe conduit icy, et il n'est tenus de suer selonques le ley del terre a tarier le trial de xii homes et autres solempnities del ley de terre, mes doit suer icy et sera determine solonques

---

* 27 Edw. III, st. 2.
† 8 Edw. II, cor. reg. Plac. in Dom. Cap. Westm. 321.
‡ Y. B. 13 Edw. IV, p. 9.

> le ley de Nature en le Chancery, viz. ley Merchant que est ley universal par toute le monde." *

One cannot help being struck with the fact that the Chancellor is here identifying the law of nations with the law of nature, just as the Roman lawyers identified the *ius gentium* with the ideal *ius naturæ*. And here, we may surmise, lay the bond between the Chancellor and the merchants. He, like the prætor, considered what was *æquum et bonum* and what was agreeable to the *mores*, or the usages of honest and honourable people. One might go further and surmise that the law merchant was in fact largely based on the Roman law. Possibly the law merchant was the channel through which the Roman law chiefly affected our law. The four consensual Roman contracts cover most of the field of mercantile law. The contract of affreightment is covered by D. 19. 2. 13, the doctrine of general average by D. 14. 2. 1, and the contracts of bottomry and respondentia by D. 22. 2. There is some corroboration of this view in the story told by Malynes † of the fair at Frankfort, where a question of suretyship arose. The opinion of the merchants was demanded thereon, " wherein there was great diversity, so that the civil law was to determine the same . . . according to the title *de mandato consilii*." We may remember that the civil law was recognised as proper in the Court of Admiralty.‡ It is almost certain, from what Lord Blackburn § has said, that the right of " stoppage *in transitu* " came through the Courts of Equity, and that it is the same right as that *revendication* which on the continent was the representative of *rei vindicatio*. We may give one or two particulars in which the Chancellor and the merchant agreed as against the common lawyer.

---

* On which case Jenkins (Rep. 102) notes that if a merchant alien has a controversy with an Englishman or another merchant alien, these controversies should be decided in the Chancery or the Star Chambers, or before the King's Council, or at common law, according to the law of nature and nations. Cf. a note to the same effect on a case, 2 Rich. III, p. 12, where three Lombards sued in Chancery, and the Chancellor called the judges into the Exchequer Chamber to consult (Rep. 164–5). Cf. also two cases mentioned in *Sel. Pleas in the Court of Admiralty*, i. xlviii–ix (Selden Soc.).

† *Lex Merc.* p. 69. Malynes' date is 1622. Pandect law was the law of the Hanse towns; Sohm, *Inst.* 6.

‡ *Bridgeman's case*, Hob. 11 (11 Jac.), a case of bottomry and borrowing of necessity. Even to-day, on a question of agency, the Digest may be referred to (*Durrant & Co.* v. *Roberts and Keighley, &c.*, [1900] 1 Q. B. 629, C. A.), though see the judgments of the House of Lords reversing this decision, [1901] A. C. 240.

§ Blackburn, *On Sale*, p. 314 *sq.*

The Law Merchant and the Common Law.—As Mr. Bigelow has said in the introduction to his book on Bills, Notes, and Cheques, in the foreign custom which the merchants brought into England there were two peculiar features which the Common Law regarded with aversion—negotiability and grace. Negotiability is the property by virtue of which certain choses in action, that is undertakings to pay, pass from hand to hand like cash on delivery. The common law repudiated the notion that a promise of *A.* to *B.* could be treated as a promise extending to *C.*, a view that was shared by the classical Roman law. Accordingly down to the Judicature Act of 1873 if it was desired to assign a chose in action, it had to be done with the assistance of equity. So Malynes writes :

> " And herein you are to note that in the buying by Bills it may be made payable to seller or to the bearer thereof, and so all the parties are bearers thereof unto whom the same is set over by tradition of it only, and this is called a rescounter in payment used among merchants beyond the seas. . . . The common law of England is directly against this course ; for they say there can be no alienation from one man to another of debts because they are held choses in action." *

As regards grace, the Common Law said that a man must perform on the day he promised to perform, unless he had the promisee's consent. The custom of merchants allowed " days of grace," the number varying at different markets. Three days was very usual, and in particular was the custom of London.† The Courts of Equity never regarded time as necessarily of the essence of the contract, and this divergence between the equitable and common law view is dealt with in the Judicature Act.

Seal and Consideration.—Neither Chancellor nor merchant set any store on consideration or seal. In spite of the efforts of Lord Mansfield, as will be remembered, the Courts of Common Law forced on the custom of merchants, which knew nothing of it, our purely indigenous doctrine of consideration.‡ This view need not surprise us, if we remember that the civil law has very little corresponding to our doctrine of consideration ; consent made the

---

* *Lex Merc.* p. 70.

† *Coleman* v. *Sayer*, 1 Barn. 303 (2 Geo. II), where the Common Serjeant and the foreman of the jury spoke to the constant practice of the City, and this was accepted by the C. J.

‡ *Pillans* v. *Van Mierop*, 3 Burr. 1663.

contract; it was dishonourable to break a promise once made. It is worth noticing that the early writers of treatises on the law merchant, Malynes (1622) and Marius (1670), were not lawyers but merchants, and that Malynes regards not so much what the law may say as what merchants will say:

> "The credit of merchants is so delicate and tender that it must be cared for as the apple of a man's eie" (p. 76). "The nature of a Bill of Exchange is so noble and excelling all other dealings between merchants, that the proceedings therein are extraordinary and singular, and not subject to any prescription by law or otherwise, but merely subsisting of a reverend custom used and solemnised concerning the same" (p. 261). "Such is the sincerity and Candor Animi amongst merchants of all nations beyond the seas in the observation of plain dealing concerning the said Bills Obligatory * that no man dare presume to question his own hand" (p. 74).

He adds that in the East,† and sometimes in the Low Countries, they will put a seal to it, but this is not a universal requirement. So Sir John Davis, writing "Concerning Impositions," about the beginning of the seventeenth century, says:

> "Whereas at Common Law no man's writing can be pleaded against him as his act and deed unless the same be sealed and delivered, in a suit between merchants, Bills of Lading and Bills of Exchange, being but tickets without seals, letters of advice and credence, policies of assurance, assignations of debt, all of which are of no force at the Common Law, are of good credit and force by the Law Merchant."

There is one comparatively small point which we may perhaps notice. By the 14 & 15 Vict. c. 99, the parties to a civil action became for the first time competent witnesses. The Court of Chancery never regarded this rule. The parties before it were always competent and frequently compellable witnesses. So, too, in a merchant suit. Malynes (p. 299) mentions the practice of

---

* The Bill Obligatory was a promissory note, prefaced by an acknowledgment of indebtedness. (Cf. *Lex Merc.* p. 74.)

† Sir F. Pollock has been good enough to point out that the Eastern seal is not a device but an engraved signature.

the Chancellors of issuing commissions to Masters in Chancery or to merchants to report to the Chancellor, whereon he issued decrees :

> " They may examine witnesses upon oath upon anything in question where there wanteth proof, or they may minister the oath to either party upon pregnant occasions to bolt out the truth,"

And again at p. 92 :

> " Therefore when merchants are contending in any Courts of Equity or law where they are delayed for many years in continual suit at their great charges, then it tendeth to the interruption of trade and commerce in general and the overthrow of parties in particular : whereof the Law of Merchants hath a singular care to provide for, and therefore doth many times (though not without danger) admit the proof to be made upon the parties' oath, if witnesses be absent."

The Bona Fide Purchaser.—Finally, in one very important matter the Chancellor and the merchant saw eye to eye. Both loved the Bona Fide Purchaser. In his interest the common law rule of *nemo dat quod non habet* was set aside. Neither got so far as the maxim *possession vaut titre*, but an approach was made to it. Possibly the standpoint of the Chancellor was not quite identical with that of the merchant, but it is permissible to suggest what that of the latter was. It was, we think, intimately connected with the desire for *celeris iustitia*, on which we have remarked already. The press of business does not permit the loss of time incident to examinations of title. The negotiable instrument, the sale in market overt, the legislation in the Factors Acts, are all manifestations of the same feeling that the honest purchaser or pledgee ought to be allowed to treat the possession of his seller or pledgor as equivalent to title or to full authority to sell or pledge. The rule about sale in market overt comes from old market law and the fairs, where any one could search for his missing goods if he chose. A person buying in these circumstances took a good title except against the Crown, and afterwards, by 21 Hen. VIII, c. 11, against the prosecutor to conviction.

Struggles between Local Admiralty and Common Law Courts.—While the local courts at seaports and markets were administering the law merchant, we notice the Admiral's Court,

which was established in the reign of Edward III for the purpose of dealing with piracy, began to excite the apprehensions of the towns possessing franchise jurisdictions. To these fears must be attributed the statutes 13 Rich. II, c. 5, and 15 Rich. II, c. 3, which defined the admiral's jurisdiction.

By the time of the Stuarts the seaport towns had fallen on evil days. Not only were they jealously watched by the Admiralty Court, and called on to produce their charters of exemption or of jurisdiction, but also by the Courts of Common Law, which had designs upon them both, and were preparing to prohibit freely. The local mercantile courts fell into desuetude, one or two Piepoudre Courts still lingered on, the only local maritime court that survived the Municipal Corporations Act, 1835, is the Admiralty Court of the Cinque Ports, which goes back earlier than 1300.*

The field was then left to the Common Law Courts and the Admiralty Court. The Common Law gave no remedy in cases of contracts made or torts committed abroad. The Admiralty relieved the want, but had no jurisdiction within the body of a county. This restriction the Common Law Courts enforced rigorously, issuing prohibitions wherever a maritime contract had not actually been made, or goods not actually supplied on the high seas, and permitting the fiction that a contract really made at sea was made at the Royal Exchange in order to withdraw the suit from the Courts of Admiralty.† The Admiralty jurisdiction over contracts then fell into disuse. Meanwhile the administration of the mercantile law in the Common Law Courts was not satisfactory, owing doubtless to the fact that it had never been made a professional study. As a result

> "when questions necessarily arose respecting the buying and selling of goods, respecting the affreightment of ships, respecting marine insurances, and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were to be found in our books of reports. . . . Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves." ‡

---

* *Admiralty Pleas*, ii. xix–xxi. † *Bl. Comm.* iii. 107.
‡ Camp. *Lives of the Chief Justices*, ii. 402.

Before Lord Mansfield appeared, "in courts of law all the evidence in mercantile cases was thrown together, they were left generally to a jury, and they produced no general principle," to be "known to all mankind not only to rule the particular case then under consideration, but to serve as a guide for the future." *

Lord Mansfield employed his learning and his genius, "not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles general rules afterwards to be quoted and recognised as governing all similar cases." † He may truly be said to be the founder of the Commercial Law of this country.

---

* *Lickbarrow* v. *Mason*, per Buller, J., 2 T. R. 63.

† *Ibid.* See also Lord Campbell's account of Lord Mansfield and his special jurymen. (*Lives*, ii. 407.)

CHAPTER XXIV

THE JEW

The Jew and the King.—The position of the Jew was peculiar and unhappy. In the feudal system there was no place for him. He was an alien, and as such had no political rights, as such could hold no estate of inheritance in land, his very residence in the country being on sufferance. He was, moreover, a hereditary alien, for, as he was not permitted to swear on the Pentateuch except for the purposes of judicial proceedings, he was unable to do homage or fealty. No Christian might do homage or fealty to him ; he could be neither any lord's man, nor any man's lord. He was the king's chattel. Unlike the "clerk," he lacked the powerful aid of the Catholic Church ; and unlike the foreign merchant, he could appeal to no temporal king to use the weapons of diplomacy in his favour. The counsels of self-interest forbade our kings to scare away the foreign merchant, our ordinances proclaim our pains to invite their welcome visits, but the Jews required no such attentions. Though they lived here on sufferance, they could hardly leave without permission.

Of the steps by which the Jew reached his peculiar relationship to the Crown nothing is known ; but though it is extremely probable that the Baronage ardently desired property in a Jew, we cannot doubt that the Crown lawyers argued that what belonged to no one in particular belonged to the king. As a matter of law, the Jew was regarded as treasure trove. The authoritative legal view is expressed in one of the Ordinances in the so-called "Laws of Edward" as follows :

> "Be it known, that all Jews wheresoever they may be in the realm are of right under the tutelage and protection of the king, nor is it lawful for any of them to subject himself to any wealthy person without the king's licence. Jews and all their effects are the king's property, and if any one withhold their money from them, let the king recover it as his own."

This was a correct statement of the law in Glanvill's day. After the Conquest the Jews came to this country in considerable numbers and settled in most of the important towns in England, where they resided in a separate quarter of their own. Though it appears that they practised handicraft to some extent, the strength of the merchant gilds prevented them from engaging in the larger operations of commerce under favourable conditions. But one course of business, remunerative, necessary, and beset with dangers lay open. The Jew could and did lend his money. The ordinary rate of interest was apparently 43⅓ per cent. per annum. The "vadium" charged the debtor's land and chattels with principal and interest, and in default the creditor was entitled to seisin, and might either sell the lands after a year's possession or hold them till he satisfied the debt out of the profits. But the Jew creditor could not be seised of land otherwise than as pledgee.

The activities of the Jews in this direction were favourably regarded by the Crown. It is not too much to say that they were the honey bees of the king. They carefully collected and stored in accessible places the golden hoard on which the king, whenever his necessities pressed, could lay his hand. This meritorious industry it was the royal interest to protect. Protective privileges were first given by Henry I to a particular family, confirmed by his successors, and extended to all Jews by a Charter of King John in 1201.

Under this Charter they could travel and settle where they pleased, they could freely buy, they could sell their securities after a year and a day's possession, they went free of tolls, and of all jurisdiction except of the king and his castellans, and they could claim to be tried by their peers and to be sworn on the Pentateuch. In all cases between a Christian and a Jew, the plaintiff must produce two witnesses, a Christian and a Jew. But if a Jew were sued by a Christian who failed to produce due evidence, the Jew could clear himself by his oath on the Pentateuch, while the Christian in like case had to wage his law with eleven compurgators.

In their own quarter, the Jewry, the king's writ did not as a rule run except in pleas of the Crown or between Christians and Jews. Cases between Jew and Jew were left to their own tribunals and settled according to their own law.

The Jewish Community "Talliaged."—Whatever financial assistance the kings had got from individual Jews, the practice of "talliaging" their community did not commence till 1168, when

Henry II demanded from them an aid of 5,000 marks. It was paid, but not with alacrity, nor without signs of royal displeasure. Twenty years later, in the year of the Saladin tithe, Henry raised at one blow £60,000 from them collectively, which equalled very nearly half of the sum raised from the country at large.

An unfortunate affair grievously affected the fortunes of the community. At the coronation of Richard the leading men of the Jewish community, desiring to pay their respects to the new king, thronged to the palace, were hustled by the crowd, and a general affray ensued. The Christians pursued the Jews to their quarters, and massacred, burnt, and looted as they could. The example was followed at other places, notably at York, where "good guidance" led the rioters to the cathedral, where the "vadia" or securities had been placed by the Jews for safe custody, and the bonds were then burnt. This touched the Crown closely, for the bonds were not in duplicate. Accordingly, when Richard returned from his captivity registries of these bonds, "Archæ," were established in the principal towns and administered each by four chirographers, two Christians and two Jews, chosen by juries summoned by the Sheriff. All loans were to be put in the legal form of a chirograph before these officials, who kept a copy, and also a register of all the chirographs and all subsequent dealings with them. Unregistered transactions seem to have been of no effect, indeed an acquittance required enrolment in the Exchequer.

This system, as Mr. Rigg the learned editor of the Jewish Plea Rolls * remarks, placed the Jews at the mercy of the Crown, for in time of need all that the king had to do was to order a scrutiny of the "Archæ," and having then ascertained the financial position of his chattels, he proceeded to talliage them with scientific precision, and if they were refractory he attached their bonds and their persons till they met his demands.

The Scaccarium Iudæorum.—In connexion with this system was the establishment in the Exchequer of a special tribunal for the trial of Jewish causes, the Scaccarium Iudæorum. Probably the Exchequer had always taken Jew causes, as the Jew was always the king's debtor, but in 1198 we find sitting with the Barons of the Exchequer four "custodes Iudæorum," of whom two were Christian and two were Jews, but these were the only Jews ever appointed. These officials were later known as "Justices of the

* In the series of volumes published by the Selden Society.

Jews," but they had not exclusive jurisdiction over the Jews. Apparently they seldom, if ever, sat out of London, nor so far as we know did they take criminal cases. It is rather hard to see how they could, as they were merely a branch of the Exchequer, which was not a court of criminal jurisdiction.

The function of these Justices or Guardians of the Jews was to protect their clients in their privileges, especially in matters of procedure; for the Jew, like the foreign merchant in London, could wage his law three-handed, and could claim, as defendant in cases arising in the Jewry, a jury "de medietate," and he was exempt from the jurisdiction of the ecclesiastical courts. But these privileges, though nominally belonging to the Jews, were really prerogatives of the Crown, which could be and were waived by the Crown at its pleasure.

There never was any real doubt that the Jews could be impleaded in civil matters either "coram Nobis" or "coram Iusticiariis Regis," while the criminal cases, of which the most important were coin clipping, forgery, and some strange accusations of ritual murder, were either tried before the Justices, usually in eyre, or a special commission.

Perhaps we are safe in supposing that the Exchequer of the Jews was the normal forum for the trial of all the London list of Jewish causes, and such from the country as were not for some reason or other taken by the king's judges on circuit. Once we hear of the Justices receiving a royal order to make a domiciliary visitation of the Jewries to find hidden hoards of wealth, and it seems that in this branch of the Exchequer were administered the estates of Jews deceased. This was a duty of great importance. The Jew alive or dead was of value. In his life he could be mortgaged, assigned, or subdemised with his arrears of talliage; after his death his estate was valued by a mixed jury and his representatives, and the least portion of it that was appropriated for the king's use was a third: the rest was allowed to devolve according to the disposition of the deceased. If the deceased left infant children, the king had their wardship and marriage, both lucrative incidents.

It is not needful here to follow in detail the fortunes of the community. Let it suffice to say that though grievously oppressed, yet they throve among the impoverished barons to such an extent that they were becoming masters of great estates in the country, and began to assume baronial state. Then, as Mr. Rigg observes, a grave political peril was imminent: for estates acquired by the

Jews potentially passed into the hands of the king. Anti-Semitism joined hands with constitutionalism, and commencing in 1269 dealt repeated blows on the Jewish community, till in 1290 Edward banished them from the kingdom. They did not return till the Protectorate of Oliver Cromwell.

ENVOI

Gentle Reader,—If you propose to sit some day in the High Court of Parliament, listen to Sir Edward Coke :

"It appeareth in a Parliament Roll that the Parliament being, as hath been said, called *commune concilium*, every member of the house being a counsellor should have three properties of the elephant : first, that he hath no gall ; secondly, that he is inflexible and cannot bow ; thirdly, that he is of a most ripe and perfect memory : which properties as there it is said ought to be in every member of the great council of parliament. First, to be without gall, that is, without malice, rancour, heat, and envy, *in elephante melancholia transit in nutrimentum corporis.* Every gallish inclination if any were, should tend to the good of the whole body the commonwealth. Secondly, that he be constant, inflexible, and not to be bowed or turned from the right, either for fear, reward, or favour, nor in judgment respect any person. Thirdly, of a ripe memory, that they remembering perils past might prevent dangers to come as in that roll of parliament it appeareth. Whereunto we will add two other properties of the elephant, the one that though they be *maximæ virtutis et maximi intellectus* of greatest strength and understanding *tamen gregatim semper incedunt*, yet they are sociable and goe in companies, for *animalia gregalia non sunt nociva, sed animalia solivaga sunt nociva.* Sociable creatures that goe in flocks and herds are not hurtful as deer, sheep, etc., but beasts that walk solely and singularly as bears, foxes, etc., are dangerous and hurtfull. The other that the elephant is *philanthropos, homini erranti viam ostendit,* and these properties ought every parliament man to have."

INDEX